SUPREME COURT, U. S.

FILED
JUN 29 1973
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-1154

JOHN P. FOLEY, JR., *et al.*,
Petitioners,

vs.

BLAIR & CO., INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1973
CERTIORARI GRANTED APRIL 16, 1973

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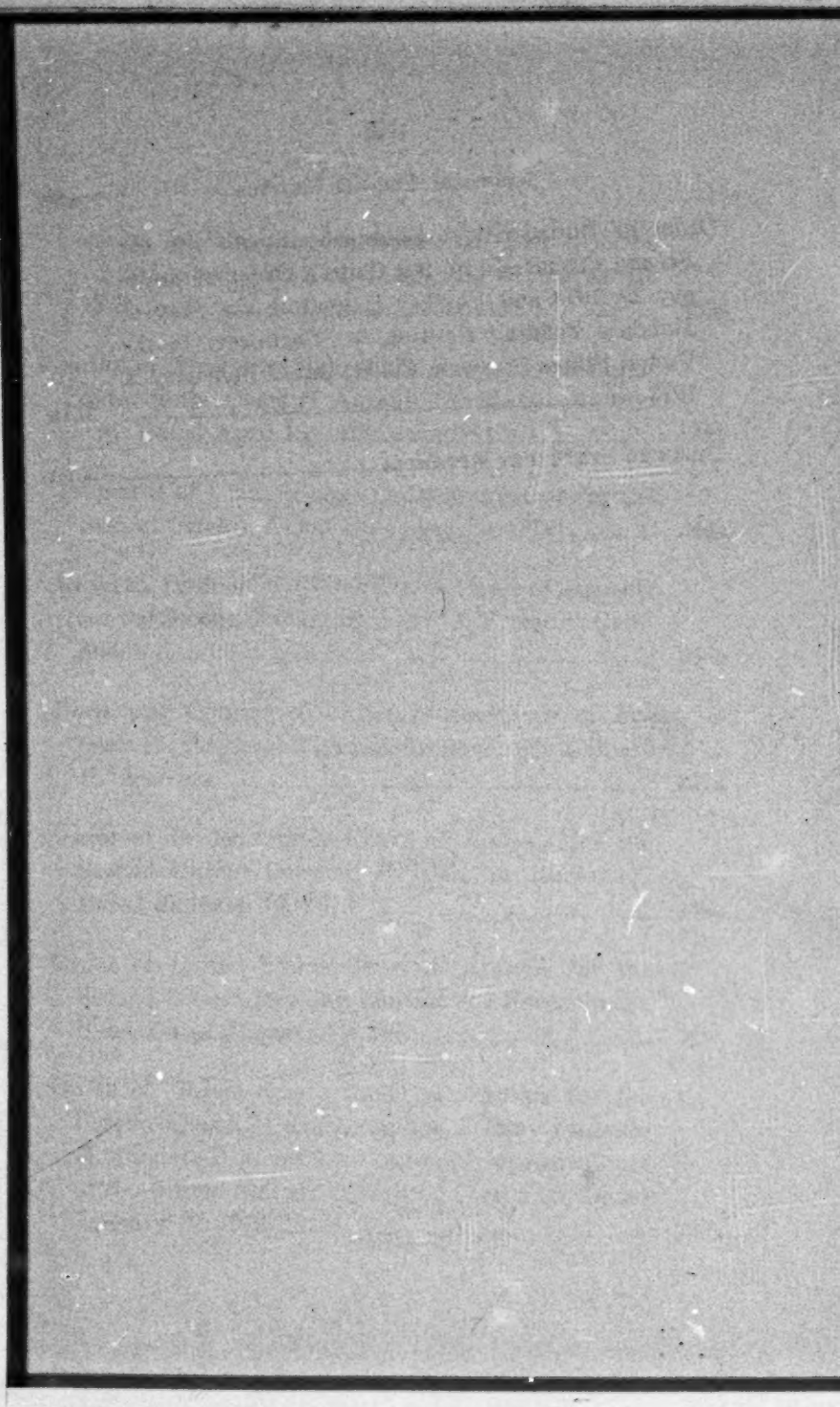

Relevant Docket Entries

DATE	PROCEEDINGS
Sept. 29—70	Filed involuntary petition—Referred to Referee Loewenthal.
Sept. 29—70	Filed petitioning creditors bond—$250.00. United States Fidelity and Guaranty Co.
Oct. 1—70	Filed petition and order appointing receiver —application denied following argument. Settle order—Wyatt, J.
Oct. 9—70	Filed certified copy of answer to involuntary petition and application for trial by jury. and referees memo that this matter be placed at the head of the appropriate Ready Day Calendar.
Oct. 16—70	Filed order that the petitioners' motion for the appointment of a receiver is denied etc. . . . WYATT, J. . . .
Oct. 29—70	Filed memo endorsed and order on motion for Re-Settlement of order of 10-16-70 . . . * * * Motion for appointment of a Receiver be and the same hereby is denied . . . WYATT, J. . . .
Dec. 14—70	Received from Referees office the following and placed same in file. Room 507 (1) Notice of motion and Motion for examination of alleged bankrupt and production of books and records filed 11/4/70 (2) Notice of motion and motion for amendment of petition in bankruptcy filed 11/4/70

Relevant Docket Entries

DATE	PROCEEDINGS
	(3) Notice of motion for summary judgment dismissing the involuntary petition filed 11/6/70
	(4) Answer to petition to amend petition in bankruptcy filed 11/10/70 (5) Answer of Liquidator of Blair & Co. to application for production of books and records filed 11/10/70 (6) Supplemental affidavit in support of motion for summary judgment dismissing involuntary petition in Bankruptcy filed 11/10/70 (7) Affidavit in support of summary judgment and in support of cross motion filed 11/10/70 (8) Minutes in reference to the above papers filed 12/11/70.
Jan. 15—71	Filed affidavit & order to show cause why this court should not assign this case to a Judge * * * or to a Special Master for all purposes etc. . . . Ret. Jan. 19—71 at 11:30 A.M. SUGARMAN, CH.J.
Jan. 19—71	Filed memo endorsed on above order to show cause . . . Petitioner's application granted to the extent that motions referred to the Court by Referee Lowenthal are referred to Referee Herzog to hear and determine . . . Settle order . . . SUGARMAN, CH.J.
Feb 2—71	Filed order in respect of motion pursuant to rule 2(b) . . . Clerk shall forthwith transmit to Referee Herzog the motion for

Relevant Docket Entries

DATE	PROCEEDINGS
	summary judgment served etc. Sugarman, J. (copy sent Referee)
Apr. 13—71	Filed transcript dtd 11-10-70.
May 12—71	Filed certificate on review of order dtd. 4-27-71. Ret. 6-1.
July 20—71	Filed stip by attorneys that the answering brief of the petition creditors be served upon the attorneys for the liquidator and the attorneys for the bankrupt on or before 7/23/71.
Aug. 16—71	Filed memo of law in opposition to petition to review referee's adjudication of the debtor in bankruptcy. Ret. 9/7.
Mar. 16—72	Filed Opinion #38334. The petition to review the determination of Referee in Bankruptcy, Hon. Asa S. Herzog, is denied. The Referee's order is confirmed. • • • Cooper J.
Apr. 17—72	Filed notice of appeal from order and opinion of Judge Cooper dated March 16, 72, adjudging Blair a bankrupt.—Filed by Mudge Rose Guthrie & Alexander, attns for Blair & Co. Inc. 20 Broad St., NYC and Weil, Gotshal & Manges and Charles Seligson, Attys for Patrick E. Scorese, as Liquidator, 767 Fifth Ave., NYC. . . . by A Member of the Firm of Weil, Gotshal & Manges. Copy mailed to Leo H. Raines, Esq. (on 4-17-72) Atty for J. P. Foley & Co. Inc. John P. Foley, Jr. and Anita Salisbury 521 Fifth Ave., NYC

Docket Entries of United States Court of Appeals

DATE	PROCEEDINGS
Apr. 20—72	Filed Record (original papers of District Court)
Apr. 20—72	Filed copies of Docket Entries and Notice of Appeal
Apr. 24—72	Filed Record (original papers of District Court)
July 17—72	Filed Joint Appendix, Appellants with Proof of Service
July 17—72	Filed Brief, Appellants with Proof of Service
Aug. 15—72	Filed Brief, Appellees with Proof of Service
Aug. 29—72	Filed Reply Brief, Appellants with Proof of Service
Nov. 9—72	Argument heard (by: Friendly, Ch. J., Mansfield, Timbers, CJJ)
Dec. 11—72	Judgment reversed, Friendly, CJ
Dec. 11—72	Dissenting in separate Opinion, Timbers, CJ
Dec. 11—72	Filed Judgment
Dec. 26—72	Filed Petition for Rehearing and Rehearing in banc (with Proof of Service)
Jan. 19—73	Filed Order Denying Petition for Rehearing
Jan. 19—73	Filed Order Denying Petition for Rehearing and Rehearing in banc

Docket Entries of United States Court of Appeals

DATE	PROCEEDINGS
Jan. 29—73	Filed Order Granting Motion for a Stay, etc. Application to be filed by 2-9-73
Feb. 2—73	Filed Order Granting Motion to modify Order of 1-29-73 so as to Stay the Mandate provided that such Petition is filed by 2-23-73
Feb. 22—73	Filed Certificate of Filing of Petition for Writ of Certiorari (S.C. No. 72-1154)
Feb. 26—73	Filed Notice of Filing of Petition for Writ of Certiorari
Apr. 20—73	Filed Certified copy of Order of Supreme Court granting Petition for Writ of Certiorari

Notice of Motion for Summary Judgment Dismissing the Involuntary Petition in Bankruptcy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN BANKRUPTCY

No. 70 B 755

In the Matter

of

BLAIR & CO., INC.,

Bankrupt.

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of A. George Saks, sworn to the 1st day of November, 1970, the undersigned will move before the Court on the 10th day of November, 1970, in Room 201, United States Court House, Foley Square, New York, New York at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment in favor of Blair & Co., Inc., dismissing the involuntary petition in bankruptcy filed herein and for such other and further relief as is just.

PLEASE TAKE FURTHER NOTICE, that answering papers, if any, shall be served and filed, together with proof of ser-

vice, at least one day prior to the return date set forth above.

DATED: New York, New York
November 2, 1970

MUDGE, ROSE, GUTHRIE & ALEXANDER
Attorneys for Blair & Co., Inc.
Alleged Bankrupt
20 Broad Street
New York, New York 10005
Tel. (212) 422-6767

By DONALD J. ZOELLER
A Member of the Firm

WEIL, GOTSHAL & MANGES and
CHARLES SELIGSON
Attorneys for Patrick E. Scorese as Liquidator appointed by the New York Stock Exchange for Blair & Co., Inc.
767 Fifth Avenue
New York, New York 10022
Tel. (212) PL 8-7800

By HARVEY R. MILLER
A Member of the Firm

To:

LEO H. RAINES, Esq.
Attorney for J. P. Foley and Company, Inc., John P. Foley, Jr. and Anita Salisbury, Petitioners,
521 Fifth Avenue,
New York, New York 10017

Affidavit of A. George Saks in Support of Motion for Summary Judgment Dismissing the Involuntary Petition in Bankruptcy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

A. GEORGE SAKS, being duly sworn, deposes and says:

1. I am a Vice-President of Blair & Co., Inc. ("Blair"), the above named alleged bankrupt, and make this affidavit in support of the motion to dismiss the involuntary petition in bankruptcy filed in this Court against Blair on September 29, 1970.

2. For the reasons hereinafter set forth and on the basis of the applicable law, Blair moves this Court for an order granting summary judgment dismissing the involuntary petition in bankruptcy on the grounds:

(a) No act of bankruptcy as alleged in the said petition has been committed; and

(b) The persons who caused the filing of the involuntary petition against Blair lack the capacity required under the Bankruptcy Act to institute, file and maintain an involuntary petition in bankruptcy against Blair.

Affidavit of A. George Saks in Support of Motion

THE NATURE OF THE BUSINESS OF BLAIR

3. Blair is a corporation organized and existing under the laws of the State of Delaware. Prior to September 29, 1970, Blair was engaged in the general brokerage and commission business as a registered broker-dealer and maintained its principal office and place of business at 20 Broad Street, New York, New York. In furtherance of its business, Blair, at one time, operated and maintained in excess of thirty branch offices throughout the United States. Blair is a member of the New York Stock Exchange, American Stock Exchange and the Midwest Stock Exchange.

4. In its capacity as a broker-dealer, Blair dealt with and acted on behalf of thousands of members of the public at large who were engaged in the purchase and sale of securities of publicly owned companies and other entities. As of August 1970, the books and record of Blair reflected the maintenance of approximately forty thousand (40,000) customer accounts. During the course of an audit of Blair's books and records at that time, its auditors received approximately twenty-five thousand (25,000) responses to audit confirmation requests.

5. At the present time, there are approximately twenty-eight thousand (28,000) customer accounts at Blair including cash accounts and margin accounts. As is usual in the operation of a broker-dealer maintaining accounts of public customers, Blair also holds for such accounts marketable securities of substantial value. Some of the securities are in the possession of Blair. Other securities of significant market value, aggregating approximately forty million dol-

lars ($40,000,000) are held by various banks as collateral security for outstanding loans to Blair. Said bank loans aggregate approximately thirty million dollars ($30,000,000) in principal amount. The total estimated market value of all securities held by Blair and the banks approximates in excess of seventy-five million dollars ($75,000,000).

6. Prior to September 29, 1970, Blair was engaged in the contraction and liquidation of its business and properties. In that connection, all of Blair's branch offices, with the exception of its record-keeping operations office in Lyndhurst, New Jersey, were either closed or surrendered to other broker-dealers and, with minor exceptions, the services of all Blair's registered representatives were terminated. Concentrated efforts were undertaken by Blair to transfer and deliver the accounts of public customers to other broker-dealers or to the customer.

7. For the purposes of assisting the public customers of Blair and in accordance with an agreement between Blair and the New York Stock Exchange ("Exchange") dated as of September 21, 1970, hereinafter described, Mr. Patrick E. Scorese was appointed by the Exchange as Liquidator for Blair on September 25, 1970.

THE INVOLUNTARY PETITION FILED AGAINST BLAIR

8. On September 29, 1970, as aforesaid, and less than five days subsequent to the appointment of Mr. Scorese as Liquidator for the purpose of assisting public customers of Blair, an involuntary petition in bankruptcy was filed with this Court against Blair by J. P. Foley & Company,

Inc., John P. Foley, Jr. and Anita Salisbury, all of 50 East 42nd Street, New York, New York. John P. Foley, Jr. is the principal of J. P. Foley & Company, Inc. and, upon information and belief, Anita Salisbury is secretary to Mr. Foley.

9. I am advised that pursuant to the provisions of the Bankruptcy Act, a petition may be filed against a person after the commission of an act of bankruptcy as defined in Section 3 of said Act, 11 U.S.C. §21. The involuntary petition in bankruptcy herein asserts that Blair has committed two acts of bankruptcy. A copy of the involuntary petition is annexed hereto as Exhibit "1."

10. The assertion of the commission of acts of bankruptcy by Blair is set forth in Paragraph 4 of the involuntary petition in bankruptcy, as follows:

> "Within four months next preceding the filing of this petition, the alleged bankrupt committed an act of bankruptcy in that the alleged bankrupt did heretofore,
>
> (a) On or about the 10th day of August, 1970, with intent to hinder, delay and defraud its creditors, convey, transfer, conceal, remove, or permit to be concealed or removed, or set over unto said divers persons, whose names are unknown to your petitioners, valuable property, consisting of a management contract of the Blair Fund of the value of $1,000,000.
>
> • • • • •

(f) while insolvent and unable to pay its debts as they mature, procure, permit, or suffer voluntarily or involuntarily the appointment of Patrick E. Scorse [sic] as Receiver (or Liquidator) of the assets of the alleged bankrupt and said Receiver (or Liquidator) was put in charge of the property of the alleged bankrupt on the 28th day of September, 1970."

A. Blair Has Not Voluntarily Transferred the Management Contract for the Blair Fund

11. The first purported act of bankruptcy asserted by the petitioners in Paragraph 4(a) of the involuntary petition in bankruptcy is that Blair perpetrated a fraudulent conveyance of valuable property consisting of a management contract relative to The Blair Fund. It is asserted that the alleged transfer was made with intent to hinder, delay and defraud Blair's creditors. The asserted act of bankruptcy is wholly untrue.

12. Blair is not and was not a party to the management contract with The Blair Fund, a publicly owned mutual fund. The management contract is or was an asset of Blair Advisory Co., Inc., a Delaware corporation and subsidiary of Blair, and its rights thereunder have not been transferred by Blair or Blair Advisory Co., Inc.

13. For the information of the Court, in August of 1970, Blair entered into an agreement with a third party pursuant to which Blair was to transfer and sell all of the capital stock of its subsidiary, Blair Advisory Co., Inc.

The sale was contemplated and was conditioned upon the approval of a new management contract at a special meeting of the shareholders of The Blair Fund. The new management contract was to be set forth in a proxy statement prepared for the aforesaid meeting of the shareholders of The Blair Fund. However, after the execution of the agreement of sale and prior to September 29, 1970, the Board of Directors of The Blair Fund declined to convene a meeting of the shareholders of that Fund and rejected and disapproved a new management contract as contemplated by the agreement of sale.

14. As a consequence of the foregoing, no sale or transfer of the capital stock of Blair Advisory Co., Inc., was ever effected and as of the date of the filing of the involuntary petition of bankruptcy, Blair Advisory Co., Inc. was still the owner of the management contract referred to in said petition.

15. The asserted act of bankruptcy set forth in Paragraph 4(a) of the involuntary petition in bankruptcy is, therefore, wholly inaccurate and untrue.

B. The Appointment of a Liquidator for Blair by the New York Stock Exchange for the Purpose of Assisting Public Customers of Blair Does Not Constitute an Act of Bankruptcy.

16. The second act of bankruptcy which the petitioners assert was committed by Blair is to the effect that while Blair was insolvent or unable to pay its debts as they matured, Blair suffered, voluntarily, or involuntarily, the ap-

pointment of a receiver or trustee to take charge of its property. The assertion stated in Paragraph 4(f) of the involuntary petition in bankruptcy is an incorporation of the statutory language set forth in Section 3a(5) of the Bankruptcy Act, 11 U.S.C. §21a(5).

17. In essence, it is asserted by the petitioners that the appointment by the New York Stock Exchange of Mr. Patrick E. Scorese as "Liquidator," pursuant to an agreement between Blair and the Exchange may be equated to the appointment of a receiver or trustee within the purview of Section 3a(5) of the Act, *supra*.

18. Assuming *arguendo* that Blair is, or was, unable to pay its debts as they matured, it is submitted that the appointment of an individual who is charged with the responsibility of (a) assisting public customers of a broker-dealer in which there is a substantial public interest, and (b) implementing a program previously adopted by the management of a broker-dealer does not constitute the commission of an act of bankruptcy under Section 3a(5) of the Act, *supra*, as asserted by the petitioners. The appointment of Mr. Scorese is not the equivalent of an appointment of a general receiver or trustee to take charge of Blair's property as required by the Bankruptcy Act.

19. Blair, as aforesaid, is a member of the New York Stock Exchange and subject to its rules and regulations. There is a substantial public interest in the affairs of Blair. Further, it should be noted that the operational and capital problems of Blair were known to Mr. John P. Foley, Jr., at the time that he became an investor in Blair as reflected

in his letter to the Exchange dated April 3, 1970, a copy of which is annexed hereto as Exhibit "2."

20. The appointment of Mr. Scorese for the purpose of assisting public customers of Blair was preceded by the adoption of a program of self-liquidation by Blair during the early summer of 1970. This program commenced as a result of the severe operational losses and concomitant shrinkage of capital which were incurred by many broker-dealers as an aftermath to the economic slowdown in the United States. As a broker-dealer with a substantial number of public customer accounts, Blair sought to protect the interests of its customers and creditors by the adoption of the program of contraction and liquidation.

21. Pursuant to the aforesaid program, Blair undertook to arrange for the transfer and delivery of public customer accounts to other broker-dealers and to the customers requesting delivery. Substantial efforts were also made to reduce potential obligations and liabilities inherent in the operation of an extensive branch office system.

22. At all times during the implementation of this program and until the end of September, 1970, it was believed by the management of Blair that the assets of Blair would be adequate and were sufficiently liquid to enable the payment and satisfaction of the obligations to all public customers and general creditors of Blair as well as enable the completion of the transfer and delivery of all public customer accounts.

23. In the course of the implementation of the aforesaid program and from time to time, Blair apprised the Exchange of the progress being made in the satisfaction of public customer claims and the transfer and delivery of the accounts of public customers. During the latter part of September 1970, it was concluded that in order to expedite the satisfaction of public customer claims, transfer and delivery of accounts of public customers, and the implementation of the program adopted by Blair, that public customers might require the assistance, direct or indirect, of the Special Trust Fund established by the Exchange and authorized by Article XIX of the Constitution of the Exchange.

24. Accordingly, the Exchange requested that Blair enter into an agreement with it pursuant to which the Exchange would (a) assist in the transfer and delivery of public customer accounts at Blair, and (b) be authorized to appoint a person characterized as a "liquidator" in the event that the Trustees of the Special Trust Fund "loan any cash, securities or other property to (Blair) or expressly guarantee any obligation of (Blair) to any one or more of its creditors, or pay all or any portion of any obligation of (Blair) to any one or more of its creditors (any such loan, guarantee, or payment to be made only in the absolute discretion of the Trustees) * * * ."

25. Thereafter, an agreement was executed between Blair and the Exchange, dated as of September 21, 1970, a copy of which is annexed hereto as Exhibit "3."

26. Article VIII of the aforesaid agreement describes the duties of a liquidator following his appointment by the Exchange. In essence, a liquidator is a person who is charged with the duty of effecting a fair and orderly liquidation of the broker-dealer so as to preserve the value of its assets and "to enable prompt settlement with its customers."

27. A liquidator appointed under the agreement of September 21, 1970 is not vested with title to the assets of Blair and his appointment is not permanent, as set forth in the provisions at pages 13 and 14 of the agreement, as follows:

> "Following the appointment of a Liquidator by the Exchange pursuant to Section VI hereof, and provided that any loan of cash, securities or other property to the Corporation by the Trustees, together with interest therefor, shall be repaid in full and any guaranty by the Trustees of any obligation of the Corporation to any one or more of its creditors shall be discharged in full and any payment of all or any part of the obligation of the Corporation to any one or more of its creditors shall be repaid in full, the Exchange agrees to terminate all powers of attorney executed by the Corporation or any Participant in favor of any Liquidator acting hereunder not later than 90 days following receipt by the Exchange of written notice from the President or any Vice-President of the Corporation requesting such termination."

Affidavit of A. George Saks in Support of Motion

28. On September 25, 1970, the Trustees of the Special Trust Fund made a loan of cash to Blair. As a consequence thereof and pursuant to Article VI of the agreement, Exhibit "3," the Exchange appointed Mr. Scorese as Liquidator for Blair.

29. Mr. Scorese, in his capacity as a liquidator, is charged with the function of assisting the public customers of Blair and administering the previously adopted program of Blair. Mr. Scorese is not a judicially appointed receiver or trustee. He is an agent authorized to liquidate the assets and properties of Blair. In that capacity, he is not a receiver or trustee within the context of Section 3a(5) of the Bankruptcy Act, *supra*. His appointment and the continuation of his activities is dependent upon an outstanding indebtedness of Blair to the Special Trust Fund of the Exchange. He is merely an agent of the Board of Directors and the voting stockholders who executed powers of attorney in his favor.

30. The appointment of an agent characterized as a liquidator under the agreement of September 21, 1970 did not terminate the business being conducted by Blair. Such an agent is not endowed with the authority or protective powers associated with a receiver or trustee within the contemplation of Section 3a(5) of the Act. Blair was still subject to suit, actions, proceedings and other matters incidental to the operation of its business after the appointment of Mr. Scorese.

31. Further, I am informed that Section 3a(5) of the Bankruptcy Act, *supra*, does not contain any reference to

"an agent authorized to * * * liquidate any of the property of a bankrupt * * *, while other sections of the Bankruptcy Act not related to a description of acts of bankruptcy do make such references. Accordingly and as set forth in the memorandum of law submitted herewith, it is submitted that the appointment of an agent authorized to liquidate the property of Blair, within the context of the agreement of September 21, 1970, cannot be equated to the fifth act of bankruptcy expressed in Section 3a(5) of the Act, *supra*.

32. By virtue of the foregoing, the involuntary petition in bankruptcy herein does not assert the commission of an act of bankruptcy by Blair which can be sustained as a matter of law. Therefore, the involuntary petition should be dismissed in all respects.

THE PETITIONERS LACK THE REQUISITE CAPACITY UNDER THE BANKRUPTCY ACT TO FILE AND MAINTAIN THE INVOLUNTARY PETITION IN BANKRUPTCY AGAINST BLAIR

33. Paragraph 3 of the involuntary petition of bankruptcy, Exhibit "1," asserts that each of the petitioners is a creditor of Blair for "money and securities loaned." In point of fact, the petitioners are investors in Blair.

34. On April 3, 1970, John P. Foley, Jr. acting on behalf of himself, the other petitioners and Anne A. Foley, entered into an agreement with Blair pursuant to which each of the petitioners made investments in Blair. As stated above, at the time of these investments, Mr. Foley acknowledged to the Exchange that his investment was not being made in reliance upon the standing of Blair as a

member organization of the Exchange or on the Exchange's surveillance of Blair or its capital position and that he was familiar with the fact that Blair had books and records problems and was subject to restrictions imposed upon it by the Exchange. Exhibit "2."

35. The investments made by the petitioners in Blair April 3, 1970 were characterized as subordinated loans to Blair and in connection therewith, Mr. Foley executed a collateral agreement and a secured note in the sum of $3,784,349. both dated April 3, 1970. The amount of the note represented the aggregate investment of the petitioners and Mr. Foley's wife, Anne A. Foley. A copy of the collateral agreement is annexed hereto as Exhibit "4." A copy of the secured note is annexed hereto as Exhibit "5."

36. The secured note executed by Mr. Foley was collateralized by allegedly marketable securities which were pledged to Blair concurrently with the execution thereof.

37. Article X of the collateral agreement, Exhibit "4," provides as follows:

> X. *Notice to Exchanges and Subordination.*
>
> (a) *No return, reduction or withdrawal* shall be made, under Paragraph V or VI hereof *until after written notice thereof has been given to the New York Stock Exchange,* the American Stock Exchange or any similar institution with which the Corporation has qualified for privileges the maintenance of which requires such notice. (Emphasis supplied).

(b) The undersigned agrees that in the event any return, reduction or withdrawal under Paragraph V or VI hereof *shall result in the return or withdrawal of Collateral at any time when the Corporation is insolvent* (whether or not the undersigned had any knowledge or notice of such insolvency at the time of any such return, reduction or withdrawal), *the undersigned will promptly upon written notice given by the Corporation or its successor or assignee within one year after such return, reduction or withdrawal execute and deliver to the same a note identical to and having a principal amount equal to the Note so returned or withdrawn* (or in the case of a reduction, in a principal amount equal to the amount of such reduction, *and secure such note on the same terms as in this* Agreement provided, with the Collateral so returned or withdrawn or with collateral having a capital requirements value at the time of the delivery thereof at least equal to the capital requirements value of such Collateral on the date of receipt of such notice. (Emphasis supplied).

(c) Anything in this Agreement to the contrary notwithstanding, any rights of the undersigned to withdraw the Note and the Collateral pursuant to Paragraph V or to obtain any return or reduction after notice given by the Corporation pursuant to Paragraph VI or to receive payments under Paragraph IV are *fully and irrevocably subordinate to and subject to the prior payment or provision for payment in full of all present and future creditors (who have not also so subordinated their claims) of the Corporation*, or

of any successor corporation, arising out of any matter occurring prior to the time fixed for such withdrawal, return, reduction or payments, as the case may be; it being understood that provision shall be deemed to have been made for payment in full of all such claims if the assets of the Corporation (or of any successor corporation) shall be adequate in amount to satisfy all such claims fully, regardless of whether any assets are in any manner set aside for that purpose; and *in the event of any receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization whether or not pursuant to bankruptcy laws, liquidation or other marshalling of assets and liabilities of the Corporation or of any successor corporation* at the time so fixed for such withdrawal, return, reduction or payments, *the undersigned shall not be entitled to participate or share, ratably or otherwise, on account of any such right in the distribution of the assets of the Corporation* or of any successor corporation *until all such claims of such present and future creditors of the Corporation and of any successor corporation have been fully satisfied or provisions made therefor.* (Emphasis supplied).

38. In accordance with the foregoing, the claims of the petitioners are subordinated to all existing creditors of Blair who have not also subordinated their claims. The purpose of the subordination was to enable the note, executed and delivered in behalf of the petitioners, to be utilized and become part of Blair's capital. The petitioners knew and were aware that their investments, although char-

acterized as subordinated loans, would be treated as capital for the purposes of computation of Blair's net capital in accordance with the rules and regulations of the Exchange. The petitioners intended that their investment be used for Blair's capital purposes.

39. It was for the purposes of strengthening Blair's capital position that petitioners made their investments in Blair. Indeed, Mr. Foley knew that Blair was submitting an application to the Exchange for the approval of his admission to Blair "as a contributor of a secured demand note" to be used as part of the firm's capital under Rule 325 of the Exchange. He also knew that such approval was granted. Patently, the petitioners were and are capital contributors. It cannot be controverted that petitioners were seeking to acquire an equity position in Blair. The nature of their investment in Blair, including the treatment thereof as capital, makes petitioners equity holders. The rights and interests of petitioners are indistinguishable from those of limited partners or preferred shareholders.

40. Pursuant to the provisions of the collateral agreement with Blair, petitioners enjoy limited liability in respect of the obligations and liabilities of Blair.

41. Petitioners are subordinated to general creditors in respect of the right to return all of their investments or payment of their claims.

42. Petitioners are liable to return payments received from Blair in the event that Blair cannot satisfy the claims of its public customers and general creditors.

43. Petitioners have no right to participate in the management of the business of Blair; the fixed interest rate of three per cent (3%) per annum in the current economic situation is not indicative of a loan; and, the petitioners right of transfer assignability is limited.

44. In light of the incontrovertible facts, petitioners are *de facto* shareholders of Blair. As such they are not creditors of Blair within the policy and purposes of the Bankruptcy Act.

45. I am informed that in accordance with Section 59, an involuntary petition of bankruptcy can only be filed in the case of Blair by three or more "creditors." As investors in and equity holders of Blair, petitioners cannot be deemed to be creditors of Blair. To characterize petitioners as creditors is to exalt form over substance. By reason of the substance of the transaction, petitioners are not creditors. Therefore, petitioners lack the requisite capacity to institute, file and maintain the involuntary petition of bankruptcy herein.

46. I am also informed that even assuming *arguendo* that petitioners can be characterized as a class of creditors, the subordination of their claims to general creditors has the effect of an equitable assignment of their claims to creditors having seniority over them. Consequently, petitioners are not the holders and owners of claims against Blair until the claims of all senior creditors have been satisfied in full.

47. The classification of petitioners as subordinated lenders or creditors, assuming that such classification is proper, does not invest petitioners with the requisite capacity to file and maintain the instant petition. The equitable assignment of subordinated claims divests them of the necessary capacity to act as petitioning creditors within the purview of the Bankruptcy Act. A contrary result would prejudice and impair the rights of senior creditors including the substantial numbers of public customers involved in the proceeding. Shareholders and holders of inferior claims which were treated as capital should not be allowed to adversely affect a senior public interest. The manner in which the assets and properties of Blair should be administered is properly within the province of those persons most directly affected thereby, to wit, the public customers and creditors senior to shareholders and so-called subordinated lenders.

WHEREFORE, it is respectfully prayed that the Court enter an order granting summary judgment dismissing the involuntary petition in bankruptcy filed against Blair and that Blair have such other and further relief as is just.

A. GEORGE SAKS

[Jurat omitted in printing]

EXHIBIT "1" ANNEXED TO AFFIDAVIT OF A. GEORGE SAKS

In the

DISTRICT COURT OF THE UNITED STATES

For the Southern District of New York

In the Matter of

Blair & Co., Inc.

Alleged Bankrupt

To the Honorable Judges of the District Court of the United States for the Southern District of New York

The Petition of J. P. Foley and Company, Inc., 50 E. 42nd Street, New York, N. Y., of John P. Foley, Jr., 50 E. 42nd Street, New York, N. Y., of Anita Salisbury, 50 E. 42nd Street, New York, N. Y. Respectfully Represents:

1. To the best of your petitioners' knowledge, information and belief the above named alleged bankrupt has not conducted any business or used any assumed, trade or any other names or designations during the past six years, other than as set forth in the above caption, and has had its principal place of business [or has resided or has had his domicile] at 20 Broad Street, New York, N. Y. 10005 within the above Judicial District, for a longer portion of the six months immediately preceding the filing of the petition than in any other judicial district.

Exhibit "1" to Affidavit of A. George Saks

2. Said Blair & Co., Inc. is neither a wage-earner nor a farmer, nor a municipal, railroad, insurance or banking corporation, nor a building and loan association, and owes debts to the amount of $1,000.00 and has been engaged in the business of stock brokerage.

3. Your petitioners are creditors of said alleged bankrupt having provable claims against fixed as to liability and liquidated in amount, amounting in the aggregate, in excess of the value of securities held by them, to $500. The nature and amount of your petitioners' claims are as follows:

The claim of your petitioner J. P. FOLEY AND COMPANY, INC. is (upon an assigned claim) for money and securities loaned to the said alleged bankrupt of the agreed price and reasonable value of upwards of $500,000.00.

The claim of your petitioner JOHN P. FOLEY, JR. is (upon an assigned claim) for money and securities loaned to the said alleged bankrupt of the agreed price and reasonable value of upwards of $1,000,000.00.

The claim of your petitioner ANITA SALISBURY is (upon an assigned claim) for money and securities loaned to the said alleged bankrupt of the agreed price and reasonable value of upwards of $50,000.00.

4. Within four months next preceding the filing of this petition, the alleged bankrupt committed an act of bankruptcy in that the alleged bankrupt did heretofore,

On or about the 10th day of August, 1970,

(a) with intent to hinder, delay and defraud its creditors, convey, transfer, conceal, remove or permit to be concealed

or removed, or set over unto said divers persons, whose names are unknown to your petitioners, valuable property, consisting of a management contract of the Blair Fund of the value of $1,000,000.00.

(b) while insolvent transfer property and various moneys amounting in the aggregate to the value or sum of $ to various creditors with intent thereby to prefer such creditors over other creditors of the same class, the names of the creditors receiving such preference being unknown to your petitioners.

* * * * *

On or about the 25th day of September, 1970,

(f) while insolvent or unable to pay its debts as they matured, procure, permit, or suffer voluntarily or involuntarily the appointment of Patrick E. Scorse as Receiver (or Liquidator) of the assets of the alleged bankrupt and said Receiver (or Liquidator) was put in charge of the property of the alleged bankrupt on the 28th day of September, 1970.

(g) admit in writing inability to pay debts and willingness to be adjudged bankrupt and that hereto annexed and made part hereof is a copy of said admission.

That there are more than twelve creditors of said alleged bankrupt.

WHEREFORE, your petitioners pray that service of this petition, with a subpoena, may be made upon the said BLAIR & Co., INC. as provided in the Act of Congress relating to bankruptcy, and that he may be adjudged by the Court to be a bankrupt within the purview of said Act.

Exhibit "1" to Affidavit of A. George Saks

Dated, the 28th day of September 1970

J. P. Foley and Company, Inc.

By: /s/ John P. Foley, Jr., President
John P. Foley, Jr.

/s/ Anita Salisbury

Petitioners

/s/ Leo H. Raines
Attorney for Petitioners

State of New York,
County of New York, *ss.*:

John P. Foley, Jr. the petitioner above named does hereby make solemn oath that the statements contained in the foregoing petition, subscribed by him, are true.

/s/ John P. Foley, Jr., *Petitioner*

Subscribed and sworn to before me this
28th day of September 1970

/s/ Jonathan V. Pollack
Jonathan V. Pollack
Notary Public, State of New York
No. 41-3126455—Queens County
Term Expires March 30, 1971

Exhibit "1" to Affidavit of A. George Saks

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ANITA SALISBURY the petitioner above named does hereby make solemn oath that the statements contained in the foregoing petition, subscribed by her, are true.

/s/ ANITA SALISBURY, *Petitioner*

Subscribed and sworn to before me this
28th day of September 1970

/s/ JONATHAN V. POLLACK
Jonathan V. Pollack
Notary Public, State of New York
No. 41-3126455—Queens County
Term Expires March 30, 1971

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

John P. Foley, Jr. being duly sworn, deposes and says that he is the of J. P. FOLEY AND COMPANY, INC. the corporate petitioner above named and makes solemn oath that he has read the foregoing petition and knows the contents thereof, that the statements contained therein are true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes them to be true.

Exhibit "1" to Affidavit of A. George Saks

Deponent further says that the reason why this verification is not made by said J. P. FOLEY AND COMPANY, INC. is that it is a corporation and that deponent is an officer of the same, to wit: the and that his knowledge is derived from the books of the corporation and from persons in its employ.

/s/ JOHN P. FOLEY, JR.

Sworn to before me this
28th day of September 1970

/s/ JONATHAN V. POLLACK
Jonathan V. Pollack
Notary Public, State of New York
No. 41-3126455—Queens County
Term Expires March 30, 1971

EXHIBIT "2" ANNEXED TO AFFIDAVIT OF A. GEORGE SAKS

April 3, 1970

New York Stock Exchange
11 Wall Street
New York, New York 10005

Attention: Department of Member Firms—
Division of Finance

Gentlemen:

Accepting the suggestion of the New York Stock Exchange, I have conducted such investigation of Blair & Co., Inc. and of its participants as I consider desirable, appropriate and necessary under the circumstances. Further, I have been furnished with all financial information with respect to Blair & Co., Inc. as I have requested, including the latest certified audit by Arthur Young and Company dated December 5, 1969 and a recent computation of net capital prepared by Blair & Co., Inc. as of February 28, 1970, which indicates that as of that date Blair & Co., Inc. was in violation of Rule 325 of the Board of Governors of the New York Stock Exchange.

My subordinated loan to Blair & Co., Inc. of even date herewith is not being made in reliance upon the standing of Blair & Co., Inc. as a member organization of the New York Stock Exchange or on the Exchange's surveillance of the organization or its capital position. I am familiar with the fact that Blair & Co., Inc. has books and record problems as a result of conversion to the Midwest Stock Exchange Service Bureau and that the New York Stock

Exhibit "2" to Affidavit of A. George Sakz

Exchange has placed restrictions upon Blair & Co., Inc. as set forth in its letter of March 10, 1970.

I agree that the New York Stock Exchange has no responsibility to disclose to me information concerning Blair & Co., Inc. which it may now have or at any time in the future may have or to protect my interest in the member organization. I agree, for myself, my personal representatives, successors and assigns, that neither the New York Stock Exchange, its Special Trust Fund nor any governor, officer, trustee or employee of said Exchange or Fund shall be liable to me with respect to Blair & Co., Inc.

Very truly yours,

/s/ John P. Foley, Jr.
John P. Foley, Jr.

EXHIBIT "3" ANNEXED TO AFFIDAVIT OF A. GEORGE SAKS

AGREEMENT dated as of September 21, 1970 between the NEW YORK STOCK EXCHANGE (the "Exchange"), Blair & Co., Inc. (the "Corporation") and directors and voting stockholders of the Corporation (each of such directors and stockholders being hereinafter referred to as a "Participant"):

WHEREAS, the Corporation has decided to transfer or deliver all of its customers' accounts and has solicited the assistance of the Exchange in this connection;

WHEREAS, a portion of the Special Trust Fund authorized by Article XIX of the Constitution of the Exchange (the "Fund") may, under certain circumstances and at the absolute discretion of the Trustees of such Special Trust Fund (the "Trustees"), be used for the purpose of providing direct or indirect assistance to customers of the Corporation threatened with loss of their money or securities because of the financial condition of the Corporation;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, the parties hereto agree as follows:

I. The Corporation agrees:

A.) That no new commitments of a material nature by or on behalf of the Corporation will be made without the prior written consent of the Exchange.

B.) That no new customer account will be opened or accepted by the Corporation and

no securities transactions other than liquidating transactions will be made in firm or any customer account, without the prior written consent of the Exchange.

C.) That the Corporation will promptly ask for customers' instructions to transfer their accounts and will transfer its customers' accounts in accordance with such instructions as soon as practicable.

II. Each of the signatories hereby agrees that, in the event the Trustees loan any cash, securities or other property to the Corporation or expressly guarantee any obligation of the Corporation to any one or more of its creditors, or pay all or any portion of any obligation of the Corporation to any one or more of its creditors (any such loan, guarantee, or payment to be made only in the absolute discretion of the Trustees), any and all such loans shall be repaid the Trustees by the Corporation in full, any and all such guarantees shall be discharged in full and any amounts expended by the Trustees pursuant to any such guarantee shall be repaid the Trustees by the Corporation in full, and the total amount of any and all such payments by the Trustees to creditors of the Corporation shall be repaid the Trustees by the Corporation in full, before any payment is made on any claim of any of the undersigned against the Corporation for the return of capital, or for the return of property and/or cash loaned

to the Corporation on a subordinated basis, or for interest thereon, or for salary or other compensation (other than such salary or other compensation as may be agreed to by the Exchange or as may be payable pursuant to an employment or retirement agreement existing on the date hereof). In the event any payment is made to, or for the benefit of, any of the undersigned, on or in satisfaction of any such claim, before repayment in full of any and all loans as may be made by the Trustees to the Corporation has been completed, or while any guarantee by the Trustees remains outstanding or before repayment in full of any and all amounts expended by the Trustees pursuant to any such guarantee, or before repayment in full to the Trustees of any and all payments made by them to creditors of the Corporation, the undersigned to or for the benefit of whom any such payment is made (and his or her heirs, executors, administrators, successors and assigns) hereby agrees that, forthwith on demand, he shall return the full amount of such payment, or the proceeds thereof, to the Corporation for the benefit of creditors of the Corporation other than the undersigned.

III. Notwithstanding any provisions of this Agreement, and whether or not the Corporation has complied or is complying therewith, the Chairman of the Board of Governors of the Exchange and the Board of Governors may at any time exercise

any power or powers under the Constitution of the Exchange (including Article XIII thereto) or the Rules of the Board of Governors.

IV. Prior to the appointment of any Liquidator as provided in Section VI hereof, a majority of the directors of the Corporation shall have full power and authority on behalf of the Corporation, at any time and from time to time (a) to accept for and on behalf of the Corporation any loan of money to the Corporation which may at any time in the future be made by the Trustees, any such loan to be payable on demand, to bear interest at the rate of 6% per annum, and to be evidenced by, and subject to all the terms and conditions of, a note substantially in the form attached hereto as Annex A, and to execute on behalf of the Corporation and deliver any such note (any such loan of money being hereinafter referred to as a "Loan"); and (b) to enter into, execute and deliver on behalf of the Corporation any agreement or agreements or power of attorney supplemental to the Power of Attorney attached hereto as Annex B, or any other instrument required by the Exchange and deemed appropriate by such directors relating to this Agreement, the business of the Corporation or the liquidation thereof.

In the event that any amount is expended by the Trustees pursuant to any guarantee by the Trustees of any obligation of the Corporation or in the event that any payment is made by the Trustees

to any creditor of the Corporation then, upon request by the Exchange, the Corporation shall execute and deliver to the Trustees a note substantially in the form attached hereto as Annex A, in the full amount of any such expenditure or payment.

V. The Corporation and each Participant hereby agrees that the proceeds of any Loan received by the Corporation from the Trustees shall be placed in a special account with a member of the New York Clearing House other than any bank to which the Corporation is indebted and that the balance in such special account from time to time shall be used by the Corporation solely for one or more of the following purposes:

i.) to make full or partial payment of any loan or loans due any bank or banks secured by the Corporation's customers' securities, in order to secure the release of such securities; *provided, however,* that for the purpose of obtaining the release of customers' securities pledged to secure any loan, the Corporation shall not pay an amount in excess of the then market value of the securities sought to be released from such loan without first obtaining the written consent of the Exchange;

ii.) to pay any one or more credit balances owed to any customer of the Corporation as a customer;

Exhibit "3" to Affidavit of A. George Saks

iii.) to pay any amount or amounts heretofore received from other brokers in connection with the loan by the Corporation of customers' securities, in order to obtain the return of such securities;

iv.) to pay any amount or amounts to any other broker representing the cost of securities purchased by the Corporation for customers, which securities have not been received from such other broker or paid for by the Corporation;

v.) to purchase, if necessary, any security or securities owed to any customer of the Corporation;

vi.) to pay any other creditor or creditors of the Corporation (other than with respect to any proprietary account) if it appears that such payment is necessary or advisable to protect customers of the Corporation including customers whose accounts have been paid or delivered to others.

In connection with the foregoing, it is understood there shall be no liability of the Corporation or any Participant as a result of the failure on the part of any Liquidator or any employee of the Exchange to apply the proceeds of any Loan in the manner set forth above.

VI. From and after the date on which the first Loan, or the first guarantee by the Trustees of any obligation of the Corporation, or the first payment

by the Trustees of all or any portion of any obligation of the Corporation to any of its creditors, is made, the Exchange shall have the right to appoint such person as it may choose as Liquidator of the business of the Corporation. Any appointment of a Liquidator shall be evidenced by a written notice by the Exchange addressed to the Corporation and delivered to the principal office of the Corporation and each of the Participants agrees, coincident with his execution of this Agreement and at the request of the Exchange, to execute a general power of attorney substantially in the form of Annex B attached hereto. The Corporation and each of the Participants further agrees, following the appointment of the Liquidator by the Exchange as herein provided, (i) to cooperate fully with the Liquidator, (ii) to execute all such additional powers of attorney as may be prescribed by the Exchange in favor of any person then serving as Liquidator, provided, however, that no such power of attorney with respect to any Participant shall grant to the Liquidator the power to create or incur any personal liability with respect to such Participant, and (iii) except as directed by the Liquidator, to refrain from doing any act or thing, on behalf of the Corporation which the Liquidator is authorized to do by any such power of attorney.

The Liquidator shall serve as such until such time as the Exchange shall terminate all powers of attorney executed by the Corporation or any Par-

ticipant in favor of the Liquidator, by written notice to the Corporation and each such Participant delivered to the principal office of the Corporation. If any person appointed by the Exchange as Liquidator of the business of the Corporation shall resign or be unable to serve, his successor shall also be a person designated by the Exchange in a written notice by the Exchange addressed to the Corporation and delivered to the principal office of the Corporation.

VII. The Corporation agrees that, on request by the Exchange it will reimburse the Exchange the full amount of any reasonable compensation paid by the Exchange to the Liquidator or to any Exchange employee with respect to that period of time while the Liquidator or such Exchange employee is engaged in assisting the Corporation or in the liquidation of its business.

Whenever the Liquidator is a person other than an employee of the Exchange, the Corporation agrees to compensate him in such amount as may be agreed by the directors of the Corporation and the Exchange.

VIII. Immediately following his appointment by the Exchange, the Liquidator shall take control of the business and property of the Corporation for the purpose of liquidating the business of the Corporation and shall proceed as follows in connection with the liquidation:

Exhibit "3" to Affidavit of A. George Saks

i.) he shall promptly take such steps as he may deem practicable to reduce the Corporation's operating expenses and to dispose of the Corporation's salable assets;

ii.) he shall have power to retain independent public accountants, consultants, counsel and other agents and assistants and shall have power to augment and reduce or eliminate the staff of the Corporation;

iii.) he shall, as soon as practicable, assert and collect or settle all claims and rights of the Corporation;

iv.) he shall pay any claim against the Corporation considered by him to be a valid claim of any customer of the Corporation;

v.) he shall take such other steps as he deems necessary or appropriate to liquidate the business of the Corporation.

It is agreed that consistent with the duty of the Liquidator to effect a fair and orderly liquidation of the business of the Corporation to enable prompt settlement with its customers, the Liquidator shall act in accordance with what he deems to be good business practice.

IX. Neither the Liquidator, any Trustee, nor any party to this Agreement, shall acquire by this Agreement or by anything done pursuant to it any interest in the business or assets of the Corporation other than the interests, powers and rights which are specifically granted by this

Exhibit "3" to Affidavit of A. George Saks

Agreement. Neither the Liquidator, the Exchange, nor any Trustee, shall by reason of this Agreement, or of anything done pursuant to it, be or become a partner of, or joint adventurer with the Corporation or any other of the undersigned, and neither this Agreement nor anything done pursuant to it shall create a partnership, joint venture or other association between any two or more of the parties to this Agreement.

Neither the Liquidator, nor the Corporation nor any Participant, nor any other person, shall have any right of recourse or indemnity against the Exchange, the Trustees, the Fund, or any member, allied member, governor, officer or employee of the Exchange in respect of any loss, liability, claim or damage sustained as a result of the execution or performance of this Agreement or any action taken or failure to act in connection therewith. Nothing herein shall be deemed to affect any right of indemnification the Liquidator may have under Section 12 of Article III of the Constitution of the Exchange.

No person other than a party to this Agreement shall have any rights under it, except as otherwise provided herein.

This Agreement shall be deemed to be a contract made under, shall be construed in accordance with and governed by, the law of the State of New York and shall be binding upon each of the parties hereto and their respective heirs, executors, administrators, successors and assigns.

Exhibit "3" to Affidavit of A. George Saks

This Agreement may be signed in any number of counterparts, no one of which need contain the signatures of all parties signing this Agreement, and as many of such counterparts as shall together contain the signatures of all of the parties who sign this Agreement shall constitute one and the same instrument.

This Agreement shall be effective as to each individual party signing this Agreement immediately upon the execution of this Agreement by such party and shall continue in effect as to such party whether or not executed by all other individuals who are within the definition of the term "Participant" as used herein.

This Agreement shall remain in effect notwithstanding the sale or other disposition by any voting stockholder of the Corporation of his membership in the Exchange.

Following the appointment of a Liquidator by the Exchange pursuant to Section VI hereof, and provided that any loan of cash, securities or other property to the Corporation by the Trustees, together with interest thereon, shall be repaid in full and any guaranty by the Trustees of any obligation of the Corporation to any one or more of its creditors shall be discharged in full and any amount expended by the Trustees in payment of all or any part of the obligation of the Corporation to any one or more of its creditors shall be repaid in full, the Exchange agrees to

terminate all powers of attorney executed by the Corporation or any Participant in favor of any Liquidator acting hereunder not later than 90 days following receipt by the Exchange of written notice from the President or any Vice President of the Corporation requesting such termination. While not executed by or on behalf of the Trustees of the Special Trust Fund of the Exchange, it is agreed that such Trustees shall have all the benefits hereof as though they were parties hereto.

For all purposes of this Agreement any guarantee by the Trustees of any obligation of the Corporation, which obligation has been or is assumed by any other member organization of the Exchange, shall be deemed to be a guarantee by the Trustees of an obligation of the Corporation.

IN WITNESS WHEREOF, each of the undersigned has executed this Agreement or has caused the same to be executed on his behalf as of the date first above written.

NEW YORK STOCK EXCHANGE

By signature illegible

DIRECTORS—HOLDERS OF VOTING STOCK

/s/ JAMES B. RAMSEY, JR.

/s/ FRANK LYNCH

BLAIR & CO., INC.

By /s/ JAMES B. RAMSEY, JR.
President

Attest:

/s/ RAYMOND B. PRICHARD
Asst. Secretary

Exhibit "3" to Affidavit of A. George Saks

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

On this 21 day of September, 1970, before me, a notary public within and for said County, personally appeared James B. Ramsey, Jr., who, being by me duly sworn, did depose and say that he is the President of Blair & Co., Inc., a corporation; that he knows the seal of said corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

/s/ H. DOROTHY TRATOR
Notary Public

H. DOROTHY TRATOR
Notary Public, State of New York
No. 31-3944725
Qualified in New York County
Commission Expires March 30, 1971

Exhibit "3" to Affidavit of A. George Saks

ANNEX A

AGREEMENT between the Trustees of the Special Trust Fund of the New York Stock Exchange (hereinafter called the "Lender") and Blair & Co., Inc. (hereinafter called the "Corporation"). Subject to the terms and conditions hereinafter set forth, the Corporation promises to pay to the Lender or assigns on demand, at the principal office of the Lender, $, and interest thereon at the rate of 6% per annum from the date hereof payable on the last day of each calendar quarter.

The Corporation agrees that it shall not voluntarily pay any claim of any stockholder or debenture holder of the Corporation as such stockholder or debenture holder, or any claim of any subordinated lender of cash and/or securities to the Corporation as such subordinated lender, or any claim of any customer of the Corporation who has subordinated such claim to the claims of other creditors of the Corporation, until the payment in full of the obligation of the Corporation hereunder, together with accrued interest thereon.

This Agreement shall be binding upon the parties hereto and their respective successors and assigns.

This instrument embodies the entire agreement between the parties hereto and shall be construed in accordance with and governed by the laws of the State of New York.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals this day of , 1970.

BLAIR & CO., INC.

By _____

TRUSTEES OF THE SPECIAL TRUST FUND

By _____

Exhibit "3" to Affidavit of A. George Saks

ANNEX B

KNOW ALL MEN BY THESE PRESENTS that effective from and after delivery to the principal office of Blair & Co., Inc. (the "Corporation") of a written notice from the New York Stock Exchange (the "Exchange") designating the person appointed by the Exchange to serve as Liquidator of the business of the Corporation in accordance with the Agreement dated as of September 21, 1970 between the Exchange, the Corporation and various Participants as defined therein (the "Agreement"), the Corporation, and each of the other signatories hereto, in whatever capacity he may act, in order more fully to carry out the terms of the Agreement, by these presents does make, constitute and appoint the person so appointed by the Exchange and any successor thereto appointed by the Exchange as provided in the Agreement (hereinafter referred to as the "Agent") the true and lawful attorney and agent of and for the Corporation and each of the other signatories hereto, and in the name, place and stead of each of them or in the Agent's own name or in his name as Liquidator to do any or all of the following acts and to exercise any or all of the following powers on behalf of the Corporation or any other signatory hereto (except so as to change the obligations of the Participants under the Agreement or as with respect to the Exchange) and each of the signatories hereto intends that the same be construed in the broadest possible manner and be not limited to their strict technical or legal meaning:

Exhibit "3" to Affidavit of A. George Saks

1. General Business

(a) To the extent that an agent is permitted by law thus to act for a principal, to discharge and to perform any duty or liability and also to exercise any right, power, privilege or option which the Corporation has, or claims to have, under any contract or agreement, and to enforce the terms of any such contract or agreement by action, proceeding or otherwise, as the Agent shall think to be desirable or necessary;

(b) to exercise in person or by proxy or to enforce by action, proceeding or otherwise, any right, power, privilege or option which the Corporation has, or any signatory hereto on behalf of the Corporation has, as the holder of any bond, share, or other security or instrument of similar character;

(c) to carry out, to continue, to modify, to renegotiate, to extend and to terminate any contractual arrangements made with any person, firm, association or corporation whatsoever by the Corporation or any signatory hereto on behalf of the Corporation prior to the execution or effectiveness of this power of attorney;

(d) to demand, to receive or to obtain by action, proceeding or otherwise, any money, or other thing of value to which the Corporation, or any signatory hereto on behalf of the Corporation, is or may become, or may claim to be entitled as the proceeds of any business operation of the Corporation, to disburse or to utilize any thing so received in the liquidation of the business of the Corporation, and to reimburse himself for any expenditures properly made

by him in the execution of the powers conferred upon him in this power of attorney; and

(e) to pay claims of customers and other creditors of the Corporation, and to take all action and do all things necessary or deemed by the Agent appropriate or desirable in this connection, including, without limitation, purchasing or redeeming from loan or pledge any securities necessary to enable the delivery of customer accounts, and selling securities to close out open positions.

2. Banking Transactions

(a) To continue, to modify and to terminate any deposit account, or other banking arrangement made by the Corporation or by any signatory hereto on behalf of the Corporation prior to the execution or effectiveness of this power of attorney;

(b) to open either in the name of the Agent alone, or in the name of the Corporation alone, or in both their names jointly or otherwise, a deposit account of any type with any banker or in any banking institution selected by the Agent, to hire such safe deposit box or vault space and to make such other contracts for the procuring of other services made available by any such banker or banking institution as the Agent shall think to be desirable;

(c) to make, to sign and to deliver Corporation checks or drafts for any purpose hereunder, to withdraw by check, order or otherwise any funds or property of the Corporation deposited with, or left in the custody of, any banker or banking institution, wherever located, either before or after the execution of this power of attorney;

Exhibit "3" to Affidavit of A. George Saks

(d) to prepare from time to time financial statements concerning the assets and liabilities or income and expenses of the Corporation, and to deliver statements so prepared to any banker, banking institution or other person, whom the Agent believes to be reasonably entitled thereto;

(e) to receive statements, vouchers, notices or other documents from any bank or banking institution with respect to any matter in which the Corporation has, or claims to have, an interest and to act with respect thereto;

(f) to have free access at any time or times to any safe deposit box or vault to which any one or more signatories hereto, as an officer or director of the Corporation, might have access, if personally present;

(g) to borrow money by bank overdraft, or by promissory note of the Corporation given for such period and at such interest rate as the Agent shall select, to give such security out of the assets of the Corporation as the Agent shall think to be desirable or necessary for any such borrowing, to pay, to renew or to extend the time of payment of any note so given or given by or on behalf of the Corporation, and to procure for the Corporation a loan from any stock or commodity exchange, banker or banking institution by any other procedure made available by such exchange, banker or institution;

(h) to make, to assign, to indorse, to discount, to guarantee, and to negotiate, for any and all purposes, all promissory notes, bills of exchange, checks, drafts or other negotiable or non-negotiable paper of the Corporation, or

payable to the Corporation or to its order, to receive the cash or other proceeds of any such transactions, to accept any bill of exchange or draft drawn by any person upon the Corporation, and to pay it when due;

(i) to receive for the Corporation and to deal in and with any trust receipt, warehouse receipt or other negotiable or non-negotiable instrument, in which the Corporation has or claims to have an interest;

(j) to apply on behalf of the Corporation for and to receive letters of credit or travelers checks from any banker or banking institution selected by the Agent, giving such indemnity or other agreements in connection therewith as the Agent shall think to be desirable or necessary;

(k) to consent to an extension in the time of payment with respect to any commercial paper or any banking transaction in which the Corporation has an interest or by which the Corporation is, or might be, affected in any way;

(l) to pay, to compromise or to contest, taxes or assessments with respect to the Corporation or any interest therein or income therefrom and to apply for refunds in connection therewith; and

(m) to demand, to receive, to obtain by action, proceeding, or otherwise any money or other thing of value to which the Corporation is, or may become, or may claim to be, entitled as the proceeds of any banking transaction conducted by the Corporation itself, or by the Agent in the execution of any of the powers described herein, or partly by the Corporation and partly by the Agent so acting, to disburse or to utilize anything so received for

purposes enumerated herein, and to reimburse himself for any expenditures properly made by him in the execution of the powers conferred upon him by this power of attorney.

3. Bonds and Shares

(a) To sell (including short sales), to exchange, to transfer, either with or without a guaranty, to release, to surrender, to hypothecate, to pledge, to revoke, create or modify a trust or to grant options concerning, to loan, to trade in, or otherwise to dispose of, any bond, share, security, instrument of similar character, commodity interest or any instrument with respect thereto, owned, or claimed to be owned, by the Corporation, by any signatory hereof on behalf of the Corporation or by any customer of the Corporation or to guaranty any signature with respect thereto;

(b) to release in whole or in part, to assign the whole or a part of, to satisfy in whole or in part, and to enforce by action, proceeding or otherwise, any pledge, incumbrance, lien or other claim as to any bond, share, instrument of similar character, commodity interest or any instrument with respect thereto, when such pledge, incumbrance, lien or other claim is owned, or claimed to be owned, by the Corporation or by any signatory hereto on behalf of the Corporation;

(c) to do any act of management or of conservation with respect to any bond, share, security, instrument of similar character, commodity interest or any instrument with respect thereto, owned or claimed to be owned by the

Corporation, by any signatory hereto on behalf of the Corporation or by any customer of the Corporation in which the Corporation or any signatory hereto on behalf of the Corporation has or claims to have an interest, including by way of illustration, but not of restriction, power to insure against any casualty, liability or loss, to obtain or to regain possession or to protect the Corporation's interest therein by action, proceeding or otherwise, to pay, to compromise or to contest taxes or assessments, to apply for refunds in connection therewith, to consent to and to participate in any reorganization, recapitalization, liquidation, merger, consolidation, sale or lease, or other change in or revival of a corporation or other association, or in the financial structure of any corporation or other association, or in the priorities, voting rights, or other special rights with respect thereto, to become a depositor with any protective, reorganization or similar committee of the bond, share, security, other instrument of similar character, commodity interest or any instrument with respect thereto, belonging to the Corporation or to any signatory hereto on behalf of the Corporation, to make any payments reasonably incident to the foregoing, to exercise or to sell any option, conversion or similar right, to vote in person or by the granting of a proxy (with or without the power of substitution), either discretionary, general or otherwise, for the accomplishment of any of the purposes enumerated herein;

(d) to carry in the name of a nominee selected by the Agent any evidence of the ownership of any bond, share, security, other instrument of similar character, commodity interest or instrument with respect thereto, belonging, or

claimed to belong, to the Corporation or any signatory hereto on behalf of the Corporation or by any customer of the Corporation;

(e) to employ, in any way believed to be desirable by the Agent, any bond, share, security, other instrument of similar character, commodity interest or any instrument with respect thereto, in which the Corporation or any signatory hereto on behalf of the Corporation has or claims to have any speculative or margin transaction personally begun or personally guaranteed, in whole or in part, by the Corporation or by any signatory hereto on behalf of the Corporation;

(f) to demand, to receive, to obtain by action, proceeding or otherwise, any money or other thing of value to which the Corporation is, or may become, or may claim to be entitled as the proceeds of any interest in a bond, share, security, other instrument of similar character, commodity interest or any instrument with respect thereto, or of one or more of the transactions enumerated herein, to conserve, to invest, to disburse or to utilize anything so received for purposes enumerated herein, and to reimburse himself for any expenditures properly made by him in the execution of the powers conferred on him by this power of attorney; and

(g) to agree and contract, in any manner, and with any broker or other person, and on any terms, which the Agent may select, for the accomplishment of any of the purposes enumerated herein, and to perform, to rescind, to reform, to release or to modify any such agreement or contract or

any other similar agreement made by or on behalf of the Corporation.

3. Personal Property

(a) To sell, to exchange, to convey either with or without covenants, to release, to surrender, to mortgage, to incumber, to pledge, to hypothecate, to pawn, to revoke, create or modify a trust, to grant options concerning, to lease or to sublet to others, or otherwise to dispose of any personal property, including any security, chattel or goods or any interest therein, owned or claimed to be owned, by the Corporation or by any signatory hereto on behalf of the Corporation, or in which the Corporation has an interest;

(b) to release in whole or in part, to assign the whole or a part of, to satisfy in whole or in part, and to enforce by action, proceeding or otherwise, any mortgage, incumbrance, lien or other claim, which exists, or is claimed to exist, in favor of the Corporation or any signatory hereto on behalf of the Corporation, with respect to any personal property, including any security, chattel or goods or any interest therein;

(c) to do any act of management or of conservation, with respect to any personal property, including any security, chattel or goods or to any interest therein owned, or claimed to be owned, by the Corporation or by any signatory hereto on behalf of the Corporation, or in which the Corporation has an interest, including by way of illustration, but not of restriction, power to insure against any casualty, liability or loss, to obtain or to regain possession, or to protect such property or interest therein, by action,

proceeding or otherwise, to pay, to compromise or to contest taxes or assessments, to apply for refunds in connection therewith, to move from place to place, to store for hire or on a gratuitous bailment, to use, to alter, and to make repairs or alterations of any such property or interest therein;

(d) to demand, to receive, to obtain by action, proceeding or otherwise, any money or other thing of value to which the Corporation or any signatory hereto on behalf of the Corporation is, or may become, or may claim to be entitled as the proceeds of any personal property, including any security, chattel or goods or of any interest therein, or of one or more of the transactions enumerated herein, to conserve, to invest, to disburse or to utilize anything so received for purposes enumerated herein, and to reimburse the Agent for any expenditures properly made by him in the execution of the powers conferred on him by this power of attorney; and

(e) to agree and to contract in any manner and with any person and on any terms, which the Agent may select, for the accomplishment of any of the purposes enumerated herein, and to perform, to rescind, to reform, to release or to modify any such agreement or contract or any other similar agreement or contract made by or on behalf of the Corporation.

5. Real Estate

(a) To sell, to exchange, to convey either with or without covenants, to quitclaim, to release, to surrender, to mortgage, to incumber, to partition or to consent to the

partitioning, to revoke, create or modify a trust, to grant options concerning, to lease or to sublet, or otherwise to dispose of, any estate or interest in land owned, or claimed to be owned, by the Corporation or by any signatory hereto on behalf of the Corporation; and

(b) to release in whole or in part, to assign the whole or a part of, to satisfy in whole or in part, and to enforce by action, proceeding or otherwise, any mortgage, incumbrance, lien or other claim to land which exists, or is claimed to exist, in favor of the Corporation or any signatory hereto on behalf of the Corporation.

6. Litigation

(a) To assert and to prosecute before any court, administrative board, department, commissioner or other tribunal, any cause of action, claim, counterclaim, offset or defense, which the Corporation has, or claims to have, against any individual, partnership, association, corporation, government, or other person or instrumentality, including, by way of illustration and not of restriction, power to sue for the recovery of land or of any other thing of value, for the recovery of damages sustained by the Corporation in any manner, for the elimination or modification of tax liability, for an injunction, for specific performance, or for any other relief and including any such cause of action, claim, counterclaim, offset or defense by the Corporation against any signatory hereto;

(b) on behalf of the Corporation to bring an action of interpleader or other action to determine adverse claims, to intervene or to interplead in any action or proceeding, and to act in any litigation as amicus curiae;

Exhibit "3" to Affidavit of A. George Saks

(c) on behalf of the Corporation in connection with any action or proceeding or controversy, at law or otherwise, to apply for and, if possible, to procure a libel, an attachment, a garnishment, an order of arrest or other preliminary, provisional or intermediate relief and to resort to and to utilize in all ways permitted by law any available procedure for the effectuation or satisfaction of the judgment, order or decree obtained;

(d) in connection with any action or proceeding, at law or otherwise, to perform any act which the Corporation might perform, including by way of illustration and not of restriction, acceptance of tender, offer of judgment, admission of any facts, submission of any controversy on an agreed statement of facts, consent to examination before trial, and generally to bind the Corporation in the conduct of any litigation or controversy as seem desirable to the Agent;

(e) to submit to arbitration, to settle, and to propose or to accept a compromise with respect to, any claim existing in favor of or against the Corporation, or any litigation to which the Corporation is, or may become or be designated a party;

(f) to waive the issuance and service of a summons, citation or other process upon the Corporation, to accept service of process, to appear for the Corporation, to designate persons upon whom process directed to the Corporation may be served, to execute and to file or deliver stipulations on the Corporation's behalf, to verify pleadings, to appeal to appellate tribunals, to procure and to give surety

and indemnity bonds at such times and to such extent as the Agent shall think to be desirable or necessary, to contract and pay for the preparation and printing of records and briefs, to receive and to execute and to file or deliver any consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement or other instrument which the Agent shall think to be desirable or necessary in connection with the prosecution, settlement or defense of any claim by or against the Corporation or of any litigation to which the Corporation is or may become or be designated a party; and

(g) to pay, from funds in his control or for the account of the Corporation, any judgment against the Corporation or any settlement which may be made in connection with any transaction enumerated in this section, and to receive and conserve any moneys or other things of value paid in settlement of or as proceeds of one or more of the transactions enumerated in this section, and to receive and indorse checks and to deposit the same.

7. Income from Corporation

To demand, to receive, to obtain by action, proceeding or otherwise any money or other thing of value in which the Corporation has or claims an interest to which any signatory hereto is or may become or may claim to be entitled as salary, wages, commission or other remuneration for services performed, or as a dividend or distribution upon any stock, or as interest or principal upon any indebtedness, or any periodic distribution of profits from any partnership or business and to indorse, collect or otherwise realize upon any instrument for the payment so received.

Exhibit "3" to Affidavit of A. George Saks

8. Records

(a) To keep records of all cash received and disbursed for or on account of the Corporation of all credits and debits to the account of the Corporation, and of all transactions affecting in any way the assets and liabilities of the Corporation;

(b) to prepare, to execute and to file all tax, social security, unemployment insurance and information returns, required by the laws of the United States, of any state or of any subdivision thereof or of any foreign government, to prepare, to execute and to file all other papers and instruments which the Agent shall think to be desirable or necessary for the safeguarding of the Corporation against excess or illegal taxation or against penalties imposed for claimed violation of any law or other governmental regulation; and

(c) to prepare, to execute and to file any record, report or statement, which the Agent shall think to be desirable or necessary for the safeguarding or maintenance of the Corporation's interest, with respect to price, rent, wage or rationing control, or other governmental activity.

9. Insurance

(a) To continue, to pay the premium or assessment on, to increase, to amend, to modify, to rescind, to release, to procure, or to terminate any contract of life, accident, health, disability, fidelity, fire, transit, liability or other insurance or surety of whatsoever nature (including, but not by way of limitation, the so-called "broker's blanket

bond") or any combination of such insurance procured by or on behalf of the Corporation which insures the Corporation or any other person, without regard to whether the Corporation is or is not a beneficiary thereunder; and

(b) to make claim under any contract of insurance mentioned in this section and to pursue, collect and/or settle any such claim or any claim heretofore made under any such contract on such basis as the Agent may deem appropriate.

10. Instruments

To execute, to acknowledge, to sell and to deliver on behalf of the Corporation or any customer of the Corporation any conveyance, revocation, declaration, modification of trust, deed, assignment, transfer, guarantee of signature, mortgage, lease, notice, consent, agreement, authorization, check, stock, bond or other security or option thereon or with respect thereto, or any other instrument or document which the Agent may think useful for the carrying out of the powers granted hereby or for the liquidation of the business of the Corporation.

11. Security Transfer

To assign or cause to be assigned on behalf of and in the name of the Corporation any securities registered in the name of Blair & Co., Inc. and the undersigned acknowledges and agrees that the signature of Blair & Co., Inc. so affixed (whether a manual or fascimile signature), as well as any such signature of Blair & Co., Inc. affixed to any assignment of securities prior to the date hereof shall be the valid signature of Blair & Co., Inc., and none of the

...o shall make any claim against any trans-
...poration whose securities are being trans-
...ith of such signature, or against any as-
...signatories her...curities, including any claim that any such
...fer agent or se... will be improperly affixed or was or will be
...ferred on the ...horized.
...signee of such ...
...signature was ...
...invalid or unau...

...scharge, and to compensate any attorney,
12. *Agents* ...rt witness or other assistant or assistants
...shall think such action to be desirable for
To hire, to c...ution by him of any of the powers given
accountant, ex...ver of attorney and to charge against the
when the Agen...rporation the fees of the Agent and of any
the proper exe...accountants, witnesses and other assistants.
him by this po...
assets of the C...
such attorneys,

...her act or acts which any one or more or
13. *General* ...tories hereto are able to do on behalf of
To do any o... or which the Corporation is able to do and
all of the sign...t shall think to be desirable or necessary
the Corporatio...tion of the business, including those acts
which the Agee performed by the person appointed as
for the liquidmant to the Agreement.
which are to ...ignatories hereto hereby agrees that he will
Liquidator pu...liver such further instruments and docu-
Each of the ...e deemed by the Agent to be necessary or
execute and d...er to implement, carry out or render more
ments as may ... of attorney, including, without limitation,
desirable in o...ney relating to the recovery of taxes under
effectual powe...
powers of atto...

the Internal Revenue Code and of other taxes based on or measured by income, as a result of the right to carry any loss for tax purposes to a fiscal year other than that in which such loss occurs.

Each of the signatories hereto hereby ratifies and confirms all that his Agent, any of the Agent's agents, or the successor, or successors of the Agent, shall lawfully do or cause to be done by virtue hereof.

This power of attorney is a power coupled with an interest and is irrevocable.

This power of attorney may be signed in any number of counterparts, no one of which need contain the signatures of all of the signatories hereto, and as many of such counterparts as shall together contain the signatures of all such signatories shall constitute one and the same instrument.

IN WITNESS WHEREOF, the undersigned has executed or caused to be executed this power of attorney this 21st day of September, 1970.

BLAIR & CO., INC.

By /s/ JAMES B. RAMSEY, JR.

ATTEST: /s/ (Signature illegible)
Assist. Secretary

/s/ JAMES B. RAMSEY, JR.

/s/ FRANK LYNCH

Exhibit "3" to Affidavit of A. George Saks

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

On this 21 day of September, 1970, before me, a notary public within and for said Cou , personally appeared James B. Ramsey, Jr., who, being by me duly sworn, did depose and say that he is the President of Blair & Co., Inc., a corporation; that he knows the seal of said corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

H. DOROTHY TRATOR
Notary Public

H. DOROTHY TRATOR
Notary Public, State of New York
No. 31-394-4725
Qualified in New York County
Commission Expires March 30, 1971

EXHIBIT "4" ANNEXED TO AFFIDAVIT OF A. GEORGE SAKS

New York, N. Y.
Date: April 3, 1970

Blair & Co., Inc.
20 Broad Street
New York, N. Y. 10005

COLLATERAL AGREEMENT

Dear Sirs:

I. *General.* The undersigned has executed in favor of you, Blair & Co., Inc. (the "Corporation") a Secured Note of even date in the form of Annex I hereto. As used herein, the term "Note" shall mean such Secured Note, as such note may be modified from time to time and any note substituted therefor in accordance with the terms hereof; and the term "Indebtedness" shall mean the unpaid principal amount of the Note.

II. *The Collateral.* As security for the payment of the Indebtedness, the undersigned hereby pledges to the Corporation the securities and cash, if any, described in Schedule A annexed to the Note, as such Schedule A may from time to time be amended in accordance with the terms hereof. As used herein, the term "Securities" shall mean the securities so described in Schedule A, and the term "Collateral" shall mean the securities and any cash or other property at any time pledged hereunder.

Exhibit "4" to Affidavit of A. George Saks

III. *Ownership and Property Rights with Respect to Collateral.* The undersigned shall have the following rights and obligations with respect to the Collateral, subject in all respects to the rights of the Corporation as the pledgee of the Collateral, as set forth herein and in the Note (including Paragraph XI (b) and (c) hereof, and prior to any liquidation as therein provided):

(a) *General.* The undersigned shall have and retain full legal and beneficial ownership of the Collateral and shall have the benefit of any increases and bear the risk of any decreases in the value of the Collateral. The undersigned shall have the sole right to vote or consent with respect to the Securities; shall have the sole right to any income therefrom or distribution thereon by payment of interest or dividends or otherwise, subject, however, to the right of the Corporation to receive and hold as pledgee all dividends payable in securities and all partial and complete liquidating dividends; and shall pay all taxes or other charges assessable by any governmental or taxing authority against him, upon or with respect to such Securities or the income therefrom or distributions thereon or the gain or loss of value thereof.

(b) *Purchases and Sales of Collateral.* The undersigned shall have the right at any time and from time to time to direct the sale of any of the Securities, and to direct the purchase of securities with any cash included in the Collateral; provided, however, that the net proceeds of any such sale and the securities so purchased shall be received and retained by the Corpora-

tion as Collateral for the Note; and provided further, that no such transaction shall be permitted without the consent of the Corporation if the effect thereof will be to reduce the capital requirements value (as hereinafter defined) of the Collateral. The undersigned shall have the right to pledge additional cash or securities as Collateral. As used herein, the term "capital requirements value" shall mean the net value of property for the purposes of computing Net Capital under Rule 325 of the New York Stock Exchange (as that Rule is now in effect or as amended from time to time).

(c) *Withdrawal or Substitution of Collateral.* The undersigned shall have the right at any time and from time to time to withdraw the whole or any part of the Collateral; provided that he substitutes at the same time as such withdrawal, cash or securities or both having a capital requirements value at least equal to the capital requirements value of the Collateral so withdrawn.

IV. *Payments with Respect to the Note.* The Corporation promises to pay to the undersigned, or his designee, an amount computed at the rate of three percent per annum of the Average Market Value of the Collateral. Such payments shall be credited to the undersigned as of the last day of each month, and shall be paid to the undersigned, or his designee, not more than ten days after the end of each quarter-year accounting period of the Corporation, as such period shall from time to time be determined by the Corporation. As used herein, the term "Average Market Value" of the Collateral shall mean the average of

(x) the market value of the Collateral at the end of the month for which such determination is made and (y) the market value of the Collateral at the end of the preceding month.

V. *Withdrawal of Note.* (a) *Basic Withdrawal Right.* Subject to the conditions herein provided, the undersigned shall have the right, at any time after thirty months after the date hereof and prior to a demand by the Corporation for payment of the Note, to withdraw the Note and the Collateral. Such withdrawal shall be effective at the expiration of six months after the end of the month in which written notice thereof is given to the Corporation by the undersigned, or at such earlier date as the Corporation may specify in writing.

(b) *Other Withdrawal Rights.*

(A) *Definitions.* For the purposes of this Paragraph V(b) the following terms shall have the respective meanings given below:

(1) "Original Capital" shall mean the sum of $21,750,000.

(2) "Determination Date" shall mean any date, after February 28, 1970, at or as of which a computation is being made for purposes of this Paragraph V(b).

(3) "Determination Period" shall mean the period commencing on March 1, 1970 and continuing to and including the Determination Date.

(4) "Adjusted Capital" shall mean the sum of

(i) the Original Capital;

(ii) the aggregate amount (at the borrowing date) of subordinated borrowings considered as capital under Rule 325 of the Board of Governors of the New York Stock Exchange made by the Corporation during the Determination Period; and

(iii) any net increase in the capital stock and surplus accounts of the Corporation for the Determination Period;

minus the sum of

(iv) the aggregate amount (at the borrowing date) of subordinated borrowings considered as capital under Rule 325 of the Board of Governors of the New York Stock Exchange withdrawn or repaid during the Determination Period exclusive of $2,104,920.25; and

(v) any net decrease in the capital stock and surplus accounts of the Corporation for the Determination Period.

(5) "Market Value Depreciation" shall mean the amount, if any, determined by subtracting from the amount determined pursuant to (i) below the amount determined pursuant to (ii) below:

(i) The aggregate market value of all subordinated securities accounts in existence on the Determination Date computed at the respective dates on which such accounts were established with the Corporation, except as to accounts etsablished on or

before February 28, 1970 which shall be computed at market value on February 28, 1970.

(ii) The aggregate market value of all such subordinated accounts computed at and as of the Determination Date.

(B) *Periodic Determinations of Adjusted Capital and Market Value Depreciation.* The Corporation covenants and agrees that it will make computations of Adjusted Capital and Market Value Depreciation at June 30, 1970 and at the end of each quarter-annual accounting period of the Corporation thereafter. A notice setting forth the results of such computations shall be mailed to the undersigned as soon as practicable but not later than 45 days after the respective Determination Date. Each such determination by the Corporation shall be conclusive and binding upon the undersigned, unless the undersigned shall notify the Corporation in writing, within 15 days after the date on which the Corporation has mailed to the undersigned the results of such determination, that the Corporation's determination is disputed. In the event of such notification, the Adjusted Capital and Market Value Depreciation at the date in question shall be determined by a firm of independent public accountants selected by the Board of Directors of the Corporation (which may be the firm which regularly examines the statement of financial condition of the Corporation), and such determination shall be conclusive and binding on the undersigned and the Corporation. The expense of any such determination by public accountants shall be borne equally by the undersigned and the Corporation.

Exhibit "A" to Affidavit of A. George Saks

(C) *Events Giving Rise to Withdrawal Rights: Exercise of Such Rights.* Subject to the conditions herein provided, if at or as of any Determination Date,

(1) The amount of the Original Capital shall exceed the amount of the Adjusted Capital by $10,000,000 or more; or

(2) The Market Value Depreciation at or as of such date shall exceed twenty-five percent of the Original Capital, and if the sum of such Market Value Depreciation plus any excess of the Original Capital over the Adjusted Capital or minus any excess of the Adjusted Capital over the Original Capital, shall exceed fifty percent of the Original Capital;

then, and in that event, the undersigned shall have the right to withdraw the Note and the Collateral, or to reduce the principal amount of the Note and proportionately to withdraw Collateral. If the undersigned exercises such right, such withdrawal or reduction shall be effective 30 days after notice of the undersigned's election to exercise such right is received by the Corporation. If the undersigned shall fail to exercise such right by notice to the Corporation given within 30 days after the results of the applicable computation are mailed to the undersigned pursuant to subparagraph (B) above, the right of the undersigned to withdraw the Note and Collateral shall terminate at the end of such 30-day period.

VI. *Return of Note and Change in Principal Amount.* (a) The Corporation may, at the end of any calendar month, return the Note and the Collateral to the undersigned, or reduce the unpaid principal amount of the Note,

after giving the undersigned notice thereof, specifying in such notice the date such return or reduction is to be made, which date shall not be earlier than one calendar month after the end of the month during which such notice is given, unless the Corporation and the undersigned shall agree to an earlier date.

(b) The Corporation may, on the first day of any calendar month, increase the principal amount of the Note to an amount not more than that for which the Collateral, in the judgment of the Corporation (which shall be conclusive), is adequate security. The undersigned agrees, at the request of the Corporation, to execute and deliver an additional Note having a principal amount equal to such increase, or by endorsement of the Note or otherwise to give to the Corporation evidence satisfactory to it of such increase; provided, however, that (i) such increase shall be effective whether or not such evidence is received, and (ii) no such increase shall be effected after written notice has been given by the undersigned pursuant to Paragraph V.

VII. *Payment of Indebtedness.* The undersigned shall have the right at any time and from time to time to pay the whole or any part of the Indebtedness and to receive therefor Subordinated Debentures of the Corporation as hereinafter provided.

VIII. *Return of Collateral.* If the Indebtedness is paid or reduced, the Corporation shall endorse the Note as discharged and satisfied to the extent of such payment or reduction and shall return to the undersigned such part,

if any, of the Collateral which, in the judgment of the Corporation (which shall be conclusive), is not necessary to provide adequate security for the unpaid principal amount of such Note after giving effect to such endorsement.

IX. *Right to Receive Subordinated Debenture.* The Corporation will issue, and the undersigned will accept, with respect to any payment (as distinguished from a return, reduction or withdrawal under Paragraph V or VI hereof) of all or part of the Indebtedness, a Subordinated Debenture in substantially the form of Annex II hereto, evidencing the indebtedness of the Corporation in a principal amount equal to such payment of all or part of the Indebtedness. It is expressly understood, however, that the right of the Corporation to liquidate the Collateral and apply the proceeds of such liquidation in payment in whole or in part of the Indebtedness, as provided for in Paragraph XI(b), shall not be affected in any way by any inability or failure to issue or any delay in the issuance of such Subordinated Debenture. Immediately upon such payment and until the issuance to him of such Subordinated Debenture, the undersigned shall have the rights of a subordinated lender on the terms set forth in Annex II.

X. *Notice to Exchanges and Subordination.* (a) No return, reduction or withdrawal shall be made under Paragraph V or XI hereof until after written notice thereof has been given to the New York Stock Exchange, the American Stock Exchange or any similar institution with which the Corporation has qualified for privileges the maintenance of which requires such notice.

Exhibit "4" to Affidavit of A. George Saks

(b) The undersigned agrees that in the event any return, reduction or withdrawal under Paragraph V or VI hereof shall result in the return or withdrawal of Collateral at any time when the Corporation is insolvent (whether or not the undersigned had any knowledge or notice of such insolvency at the time of any such return, reduction or withdrawal), the undersigned will promptly upon written notice given by the Corporation or its successor or assignee within one year after such return, reduction or withdrawal execute and deliver to the same a note identical to and having a principal amount equal to the Note so returned or withdrawn (or in the case of a reduction, in a principal amount equal to the amount of such reduction), and secure such note on the same terms as in this Agreement provided, with the Collateral so returned or withdrawn or with collateral having a capital requirements value at the time of the delivery thereof at least equal to the capital requirements value of such Collateral on the date of receipt of such notice.

(c) Anything in this Agreement to the contrary notwithstanding, any rights of the undersigned to withdraw the Note and the Collateral pursuant to Paragraph V or to obtain any return or reduction after notice given by the Corporation pursuant to Paragraph VI or to receive payments under Paragraph IV are fully and irrevocably subordinate to and subject to the prior payment or provision for payment in full of all present and future creditors (who have not also so subordinated their claims) of the Corporation, or of any successor corporation, arising out of any matter occurring prior to the time fixed for such with-

drawal, return, reduction or payments, as the case may be; it being understood that provision shall be deemed to have been made for payment in full of all such claims if the assets of the Corporation (or of any successor corporation) shall be adequate in amount to satisfy all such claims fully, regardless of whether any assets are in any manner set aside for that purpose; and in the event of any receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization whether or not pursuant to bankruptcy laws, liquidation or other marshalling of assets and liabilities of the Corporation or of any successor corporation at the time so fixed for such withdrawal, return, reduction or payments, the undersigned shall not be entitled to participate or share, ratably or otherwise, on account of any such right in the distribution of the assets of the Corporation or of any successor corporation until all such claims of such present and future creditors of the Corporation and of any successor corporation have been fully satisfied or provision made therefor.

XI. *Rights of the Corporation.* The Corporation, as the holder of the Note and pledgee of the Collateral, shall (without limiting its other rights) be entitled:

(a) To deposit any cash from time to time pledged as Collateral in an account or accounts in its own name in any bank or trust company, and to hold the Securities in such form as it may deem advisable, either in its own name or in the name of a nominee or nominees, or in the name of the undersigned, in "good delivery" form.

Exhibit "4" to Affidavit of A. George Saks

(b) If the Note is not paid upon presentment and demand as therein provided, to liquidate the Collateral and to apply the proceeds of such liquidation (together with any cash included in the Collateral) in payment, in whole or in part, of the Indebtedness.

Any liquidation above provided for may be effected by a sale or sales for cash or otherwise, upon an Exchange or over-the-counter market, or at any other public or private sale, and with or without any advertisement or notice whatsoever, as the Corporation in its sole discretion shall determine. The purchaser of any securities at any such sale shall take the same free of any right of redemption and any other right or claim on the part of the undersigned, all of which rights and claims are hereby waived and released. The Corporation may be the purchaser at such a sale only if such sale be public or if made upon an Exchange or over-the-counter market at the current market price. The proceeds of any such liquidation shall be the net cash proceeds thereof, after deducting all expenses thereof.

(c) The Corporation shall have the right at any time and from time to time and without notice to the undersigned, to pledge, re-pledge, hypothecate or re-hypothecate any or all of the Collateral (seperately or in connection with other securities or any other property) to secure indebtedness of the Corporation in any amount (whether larger or smaller than the Indebtedness of the undersigned, and without requiring a like amount of securities in the Corporation's possession and control; provided, however, that in the event the Corporation because of any such pledge, re-

pledge, hypothecation or re-hypothecation can not return to the undersigned any of the Collateral which the undersigned may then be entitled to receive, or its equivalent in cash or other marketable securities, the then market value of the Collateral not so returned shall be determined, and there shall be delivered to the undersigned an amount of Debentures of the Corporation in substantially the form of Annex II hereto evidencing indebtedness in a principal amount equal to such market value, and the Note shall be discharged to the extent that Debentures are so issued.

XII. *Acceleration of Maturity.* The Note and Collateral may, at the option of the undersigned but subject to the provisions of Paragraphs X and XI hereof, be withdrawn at any time if any one or more of the following events shall happen and be continuing at the time of such withdrawal: The Corporation shall become insolvent, or commit any act of bankruptcy or make a general assignment for the benefit of creditors; a receiver is appointed for the Corporation or all or a substantial part of its property; default shall be made with respect to any other indebtedness of the Corporation and maturity thereof is accelerated; or the Corporation shall default in performance or compliance with any of the terms of this Collateral Agreement, other than the covenant to make payments under Paragraph IV.

XIII. *Miscellaneous Provisions.*

(a) *Warranties of the Undersigned.* The undersigned hereby warrants that he has duly executed the Note, that he has duly delivered the Note to the Cor-

poration and upon such delivery the Corporation acquired good title thereto, that the Note is his valid and binding obligation enforceable by the Corporation in accordance with its terms; that he has duly and validly pledged with the Corporation the Securities described in Schedule A annexed to the Note and that all such Securities are in "good delivery" form; and that the Corporation as the pledgee of the Securities has the rights with respect thereto which are conferred upon it by this Agreement. Each such representation and warranty shall survive the execution and delivery of the Note and the pledge of the Securities.

(b) *Corporation as Pledgee of the Collateral.* The Collateral shall be held by the Corporation, as pledgee, in accordance with the terms hereof, to assure the faithful performance by the undersigned of his obligations under the Note, in an account in the name of the undersigned, to be designated his "Secured Note Collateral Account". Subject to the prior rights of the Corporation as pledgee, title to all Collateral shall remain in the undersigned until such Collateral is liquidated by the Corporation. All the right and interest of the Corporation in the Collateral shall terminate upon payment in full of all Indebtedness.

(c) *Re-execution of Note.* The undersigned agrees upon demand of the Corporation to re-execute a note identical to the Note (or any outstanding note which has been substituted therefor in accordance with the terms hereof), if outstanding five years from the date of the execution of the last such note.

Exhibit "4" to Affidavit of A. George Saks

(d) *Notices.* Any notice required or permitted to be given under Paragraphs V and VI of this Agreement shall be sufficiently given if in writing sent by registered mail or certified mail to the appropriate party at the address set forth in this Agreement, or at any such other address as such party may from time to time specify for the purpose in a notice similarly given. All other notices required or permitted to be given under this Agreement, shall be sufficiently given if in writing and if delivered, mailed or telegraphed to the appropriate party at the address set forth in this Agreement, or at such other address such party may from time to time specify in a notice similarly given. All notices to the Corporation or from the Corporation shall, respectively, be addressed to the attention of or signed by an elected officer of the Corporation (as defined in the By-laws of the Corporation, as they may from time to time be amended).

(e) *Governing Law.* This Agreement shall be deemed to have been made under, and shall be governed by, the laws of the State of New York in all respects, including matters of construction, validity and performance.

(f) *Arbitration.* Any controversy arising out of or relating to this Agreement or the breach thereof shall be submitted to and settled by arbitration pursuant to the Constitution of the New York Stock Exchange. The parties hereto and all who may claim under them, shall be conclusively bound by such arbitration.

Exhibit "4" to Affidavit of A. George Saks

Kindly indicate your acceptance of the foregoing by signing the two copies hereof in the space indicate and returning one to the undersigned, thereby constituting the foregoing an agreement among ourselves.

/s/ JOHN P. FOLEY, JR.
Address 50 East 42nd St.
New York, New York 10017

ACCEPTED AND CONFIRMED

BLAIR & CO., INC.

By /s/ B. H. HEPBURN
Vice President

Exhibit "4" to Affidavit of A. George Saks

SECURED NOTE

Date: April 3, 1970

$3,784,349.

FOR VALUE RECEIVED, I promise to pay to BLAIR & Co., INC. (the "Corporation") at its principal office at 20 Broad Street, New York, New York (where presentment and demand for payment shall be made), without interest, the sum of Three Million Seven Hundred Eighty-Four Thousand Three Hundred Forty-Nine Dollars ($3,784,349.), on demand.

This Note is secured at its date by the pledge of the securities and cash, if any, described in Schedule A annexed hereto.

This Note and the securities and cash from time to time pledged to secure it are subject in all respects to the provisions of a Collateral Agreement of even date between the Corporation and the undersigned, a copy of which may be examined at the principal office of the Corporation.

The Corporation, by acceptance hereof, agrees, for itself, its representatives, successors and assigns (1) that neither I, my heirs, executors, administrators or assigns shall be personally liable on this Note, it being intended that my obligation to pay the principal amount of this Note is included for the sole purpose of establishing the existence of the indebtedness represented hereby, (2) that in the event of default the Corporation and any such successor or assign shall look for payment solely to the security of the property then pledged to secure the same, and will not make claim or institute any action or proceeding against

Exhibit "4" to Affidavit of A. George Saks

me, my heirs, executors, administrators or assigns for the payment of this Note or for any deficiency remaining after application of the property pledged to secure this Note, or otherwise; provided, however, that nothing herein contained shall be construed to release or impair the indebtedness evidenced by this Note, or of the lien upon the property pledged to secure it, or preclude the application of said pledged property to the payment hereof in accordance with the provisions of Paragraph XI of the Collateral Agreement.

/s/ JOHN P. FOLEY, JR.
Payor—John P. Foley, Jr.

Exhibit "4" to Affidavit of A. George Saks

SCHEDULE A
TO SECURED NOTE

CASH: $

SECURITIES:

AMOUNT	SECURITY
SEE RIDER	

Exhibit "4" to Affidavit of A. George Saks

ANNEX II

BLAIR & CO., INC.

SUBORDINATED DEBENTURE NOTE

No. ..... $.....

BLAIR & CO., INC., a Delaware corporation (the "Corporation"), for value received, hereby promises to pay to the sum of $, and to pay interest from the date hereof on that sum to the registered holder hereof at the prime rate of interest in New York City but not less than six percent (6%) per annum, semi-annually, on November 1st and May 1st in each year, until the principal of this Debenture shall be paid.

In addition to the fixed interest herein provided for, the Corporation promises to pay to the registered holder hereof, on April 1st in each year, an additional interest payment at the rate of up to but not more than two percent (2%) per annum, on the principal amount hereof payable only to the extent that Net Income (as hereinafter defined) of the Corporation for the next preceding fiscal year is available for such payment, provided that if the date of issue of this Debenture is subsequent to the first day of such next preceding fiscal year such additional interest shall be prorated from the date of issue hereof to the last day of such next preceding fiscal year. The term Net Income as used herein shall mean, for any fiscal year net income of the Corporation as determined in accordance with generally accepted accounting principles and after

adequate provision for all taxes, depreciation and other accruals and reserves; provided, however, that (a) there shall not be included in Net Income any income required to be credited to the Special Accounts established pursuant to Section 4 of the Pre-Merger Agreement of the Corporation dated October 31, 1963 (the "Pre-Merger Agreement"), and any income in respect of the receipt of, or gain or loss arising from the sale or other disposition of, any warrants, rights, options or similar securities acquired by the Corporation in connection with any underwriting of securities or arrangement for the public or private purchase or sale of securities, or any gain or loss arising from the sale of securities acquired pursuant to exercise of any such warrants, rights, options or similar securities, and (b) there shall be added to Net Income an amount equal to the sum of all debits required to be made to such Special Accounts. In the event that Net Income for any fiscal year is not sufficient to permit the payment of additional interest at the full rate of two percent (2%) per annum on this Debenture and all other Debentures of the Corporation of like tenor of any series at the time outstanding, the Corporation shall, to the extent that Net Income is available, pay such Net Income as additional interest to the registered holder of this Debenture and of all other Debentures of like tenor of any series at the time outstanding, pro rata.

The registered holder hereof shall have the right, by notice in writing, to require the Corporation to purchase this Debenture in whole or in part, in any multiple of $1,000 of the principal amount hereof on the date which is thirty months after the date of the Collateral Agreement between the registered holder hereof and the Corporation pursuant to

which this Debenture was issued to such registered holder, or any date thereafter, on thirty days' written notice to the Corporation of such registered holder's election to exercise such right, and upon the due date for such payment the Corporation shall pay to the registered holder hereof the principal amount hereof or such portion of such principal amount as the registered holder has designated, together with fixed interest to the date of such payment and additional interest from the beginning of the then current fiscal year to such date, calculated as if the then current fiscal year of the Corporation had ended on the last day of the month next preceding the month in which such payment is made.

For the purposes of this and the next two succeeding paragraphs, the following terms shall have the respective meanings given below:

(1) "Original Capital" shall mean the sum of $21,750,000.

(2) "Determination Date" shall mean any date, after February 28, 1970, at or as of which a computation is being made for purposes of the next two succeeding paragraphs.

(3) "Determination Period" shall mean the period commencing on March 1, 1970 and continuing to and including the Determination Date.

(4) "Adjusted Capital" shall mean the sum of

(i) the Original Capital;

(ii) the aggregate amount (at the borrowing date) of subordinated borrowings considered as capi-

tal under Rule 325 of the Board of Governors of the New York Stock Exchange made by the Corporation during the Determination Period; and

(iii) any net increase in the capital stock and surplus accounts of the Corporation for the Determination Period;

minus the sum of

(iv) the aggregate amount (at the borrowing date) of subordinated borrowings considered as capital under Rule 325 of the Board of Governors of the New York Stock Exchange withdrawn or repaid during the Determination Period exclusive of $2,104,920.25; and

(v) any net decrease in the capital stock and surplus accounts of the Corporation for the Determination Period.

(5) "Market Value Depreciation" shall mean the amount, if any, determined by subtracting from the amount determined pursuant to (i) below the amount determined pursuant to (ii) below:

(i) The aggregate market value of all subordinated securities accounts in existence on the Determination Date computed at the respective dates on which such accounts were established with the Corporation, except as to accounts established on or before February 28, 1970 which shall be computed at market value on February 28, 1970.

Exhibit "4" to Affidavit of A. George Saks

(ii) The aggregate market value of all such subordinated accounts computed at and as of the Determination Date.

The Corporation covenants and agrees that it will make computations of Adjusted Capital and Market Value Depreciation at June 30, 1970 and at the end of each quarter-annual accounting period of the Corporation thereafter. A notice setting forth the results of such computations shall be mailed to the registered holder as soon as practicable but not later than 45 days after the respective Determination Date. Each such determination by the Corporation shall be conclusive and binding upon the registered holder, unless the registered holder shall notify the Corporation in writing, within 15 days after the date on which the Corporation has mailed to the registered holder the results of such determination, that the Corporation's determination is disputed. In the event of such notification, the Adjusted Capital and Market Value Depreciation at the date in question shall be determined by a firm of independent public accountants selected by the Board of Directors of the Corporation (which may be the firm which regularly examines the statement of financial condition of the Corporation), and such determination shall be conclusive and binding on the registered holder and the Corporation. The expense of any such determination by public accountants shall be borne equally by the registered holder and the Corporation.

Subject to the conditions herein provided, if at or as of any Determination Date,

Exhibit "4" to Affidavit of A. George Saks

(1) The amount of the Original Capital shall exceed the amount of the Adjusted Capital by $10,000,000 or more; or

(2) The Market Value Depreciation at or as of such date shall exceed twenty-five percent of the Original Capital, and if the sum of such Market Value Depreciation plus any excess of the Original Capital over the adjusted Capital or minus any excess of the Adjusted Capital over the Original Capital, shall exceed fifty percent of the Original Capital;

then, and in that event, the registered holder hereof shall have the right, on thirty days' written notice to the Corporation of such registered holder's election to exercise such right, to require the Corporation to purchase this Debenture in whole or in part, in any multiple of $1,000 of the principal amount hereof, and upon the thirtieth day after the giving of such written notice the Corporation shall pay to the registered holder hereof the principal amount hereof or such portion of such principal amount as the registered holder has designated, together with fixed interest to the date of such payment and additional interest from the beginning of the then current fiscal year to such date, calculated as if the then current fiscal year of the Corporation had ended on the last day of the month next preceding the month in which such payment is made. If the registered holder shall fail to exercise such right by notice to the Corporation given within thirty days after the results of the applicable computations are mailed to the registered holder pursuant to the immediately preceding paragraph, the right of the registered holder to require the Corporation to pur-

chase this Debenture pursuant to this paragraph shall terminate at the end of such thirty-day period.

This Debenture is subject to redemption at the election of the Corporation, as a whole at any time, or in part at any time, or from time to time, upon at least thirty day's notice in writing given to the registered holder hereof at his address as it appears on the books of the Corporation, at the principal amount hereof, together with fixed interest to the date of redemption and additional interest from the beginning of the then current fiscal year to such date, calculated as if the then current fiscal year of the Corporation had ended on the last day of the month next preceding the month in which such redemption occurs; provided, however, that no such payment of additional interest shall be payable prior to the fifteenth day of any month. If this Debenture or any part thereof be so called for redemption, the principal amount to be redeemed shall mature and shall became due and payable on the date of redemption, together with interest to such date as aforesaid. Unless the Corporation shall fail to pay such principal amount and interest, interest on such principal amount shall cease to accrue from and after such date.

The payment of the principal of and interest on this Debenture is fully and irrevocably subordinated to and subject to the prior payment or provision for payment in full of all present and future creditors (who have not also so subordinated their claims) of the Corporation, or of any successor corporation, arising out of any matter occurring prior to the time fixed for the purchase or redemption of this Debenture, it being understood that provision shall have been deemed to have been made for payment in full

of all such claims if the assets of the Corporation (or of any successor corporation) shall be adequate in amount to satisfy all such claims fully, regardless of whether any assets are in any manner set aside for that purpose; and in the event of any receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization whether or not pursuant to bankruptcy laws, liquidation or other marshalling of assets and liabilities of the Corporation or of any successor corporation at the time so fixed for such purchase or redemption, the undersigned shall not be entitled to participate or share, ratably or otherwise, on account of this Debenture in the distribution of the assets of the Corporation or of any successor corporation until all such claims of such present or future creditors of the Corporation and of any successor corporation have been fully satisfied or provision made therefor.

The registered holder hereof agrees that in the event that any payment on account of the principal hereof shall be made by the Corporation at any time when the Corporation is insolvent (whether or not the registered holder hereof had any knowledge or notice of such insolvency at the time of such payment), the registered holder hereof will promptly upon written notice given not more than one year from the date of such payment by the Corporation or its successor or assignee repay to the Corporation a sum equivalent to the amount of such payment.

Payment of the principal of and interest on this Debenture will be made at the office of the Corporation in the Borough of Manhattan, City of New York, in such coin or currency of the United States of America as at the time of

payment is legal tender for the payment of public and private debts.

This Debenture shall not be assigned or transferred without prior approval of the Corporation. So long as the Corporation continues as a member of the New York Stock Exchange, this Debenture will not, without the prior written approval of that Exchange, be transferred, sold, assigned or pledged, and there will not be created or permitted to be created any lien, charge or encumbrance upon this Debenture.

No recourse shall be had for the payment of the principal of, or interest on, this Debenture, or any part thereof, or for any claim based hereon or otherwise in respect hereof, or of the indebtedness represented hereby, or upon any obligation, covenant or agreement contained herein, or any indenture supplemental thereto, against any incorporator, stockholder, officer or director, as such, past, present or future, of the Corporation or of any successor corporation either directly or through the Corporation or any such successor corporation, whether by virtue of any constitutional provision, statute or rule of law, or by the enforcement of any assessment or penalty or otherwise, all liability, if any, of that character against every such incorporator, stockholder, officer or director, being by the acceptance hereof, and as part of the consideration for the issue hereof, expressly waived and released.

This Debenture shall become and be immediately due and payable on demand if any one or more of the following events shall happen and be continuing at the time of such

demand; default shall be made in the payment of the principal of this Debenture when and as the same shall become due and payable; the Corporation shall become insolvent, or commit any act of bankruptcy or make a general assignment for the benefit of creditors; a receiver is appointed for the Corporation or all or a substantial part of its property; default shall be made with respect to any other indebtedness of the Corporation and maturity is as a result thereof accelerated; or the Corporation shall default in performance or compliance with any of the terms of this Debenture other than default in the payment of interest.

IN WITNESS WHEREOF, BLAIR & CO., INC. has caused this Debenture to be signed in its name and behalf by the manual signature of its President or one of its Vice Presidents, and its corporate seal to be hereunto affixed and attested by the manual signature of its Secretary or one of its Assistant Secretaries.

BLAIR & CO., INC.

By .....
President

DATE:

ATTEST:

.....
Secretary

EXHIBIT "5" ANNEXED TO AFFIDAVIT OF A. GEORGE SAKS

Secured Note

Date: April 3, 1970

$ 3,784,349.

For value received, I promise to pay to Blair & Co., Inc. (the "Corporation") at its principal office at 20 Broad Street, New York, New York (where presentment and demand for payment shall be made), without interest, the sum of Three Million Seven Hundred Eighty-Four Thousand Three Hundred Forty-Nine Dollars ($3,784,349.), on demand.

This Note is secured at its date by the pledge of the securities and cash, if any, described in Schedule A annexed hereto.

This Note and the securities and cash from time to time pledged to secure it are subject in all respects to the provisions of a Collateral Agreement of even date between the Corporation and the undersigned, a copy of which may be examined at the principal office of the Corporation.

The Corporation, by acceptance hereof, agrees, for itself, its representatives, successors and assigns (1) that neither I, my heirs, executors, administrators or assigns shall be personally liable on this Note, it being intended that my obligation to pay the principal amount of this Note is included for the sole purpose of establishing the existence of the indebtedness represented hereby, (2) that in the event of default the Corporation and any such successor or

Exhibit "5" to Affidavit of A. George Saks

assign shall look for payment solely to the security of the property then pledged to secure the same, and will not make claim or institute any action or proceeding against me, my heirs, executors, administrators or assigns for the payment of this Note or for any deficiency remaining after application of the property pledged to secure this Note, or otherwise; provided, however, that nothing herein contained shall be construed to release or impair the indebtedness evidenced by this Note, or of the lien upon the property pledged to secure it, or preclude the application of said pledge property to the payment hereof in accordance with the provisions of Paragraph XI of the Collateral Agreement.

/s/ JOHN P. FOLEY, JR.
Payor—John P. Foley, Jr.

	Security			Shares	Price Close 4/8	Valuation
	JOHN P. FOLEY, JR. 13-097047-6					
	Allison Steel Manufacturing Co.	9 3/8	9,375.00	1,000	9 7/8	9 875 00
	American General Insurance Co.	20 3/4	12,450.00	600	19 3/4	11 850 00
Reid	Amicon Corporation			27,250	—	—
	Anaconda Co.	29 1/4	14,700.00	400	29	11 600 00
	Arlan's Department Stores Inc.	13 5/8	13,625.00	1,000	13 1/4	13 250 00
	Associated British Foods Ltd.-			5,000	1 1/8	5 625 00
	Beverly Hills Bancorp.			500	14 1/2	7 250 00
	Block Engineering Inc.			1,000	6 1/2	6 500 00
	Clark Oil & Refining Corp.	23 3/4	9,500.00	400	23 3/4	9 500 00
Reid	Evans Products Co. $4 Conv.	35	Pfd. convertible into 7/10 Common Stock (2/10) N.Y.S.E.	926	—	71 394 60
	Fairmont Foods Co.	17 3/8	9,250.50	500	17	8 500 00
	Federal Resources Corp.	5 3/8	5,627.50	1,000	5	5 000 00
	First Pennsylvania Corp.		5,324.00	408	58 1/2	23 868 00
	Gibraltar Financial Corp. of Calif.	20 1/2	23,124.00	1,128	26 1/2	23 124 00
	Giddings & Lewis Inc.	12 3/4	12,750.00	1,000	13	13 000 00
	Guerdon Industries	18 3/4	9,376.00	500	19 7/8	9 437 50
	Hartford Fire Insurance Co.	51 1/4	25,625.00	500	50 1/8	25 062 50
	Heinicke Instrument Co.	10 3/8	5,187.50	500	10 1/4	5 125 00
	Intermountain Gas Co.	8 7/8	8,875.00	1,000	8 1/2	8 500 00
	Kaiser Aluminum & Chemical Corp.	38 3/8	38,375.00	1,000	38	38 000 00
	Lane Bryant Inc.	39 1/4	19,875.00	500	38 3/4	19 375 00

						4/8	VALUATION
	Allison Steel Manufacturing Co.	9 3/8	9,375.00	1,000	9 7/8		8 875 00
	American General Insurance Co.	20 3/4	12,450.00	600	19 3/4		11 850 00
Rec'd	Amicon Corporation			27,250	—		—
	Anaconda Co.	29 1/4	11,700.00	400	29		11 600 00
	Arlan's Department Stores Inc.	13 5/8	13,625.00	1,000	13 1/4		13 250 00
	Associated British Foods Ltd.-			5,000	1 1/8		5 625 00
	Beverly Hills Bancorp.			500	14 1/2		7 250 00
	Block Engineering Inc.			1,000	6 1/2		6 500 00
	Clark Oil & Refining Corp.	23 3/4	9,500.00	400	23 3/4		9 500 00
Rec'd	Evans Products Co. $4 Conv. Pfd.	35 1/4	CONVERTIBLE INTO 1 1/2 SHS. OF COM. STOCK (2/3/80) N.Y.S.E. 19,750.00	926	x		71 394 60
	Fairmont Foods Co.	17 3/8	8,687.50	500	17		8 500 00
	Federal Resources Corp.	5 3/8	5,375.00	1,000	5		5 000 00
	First Pennsylvania Corp.			408	58 1/2		23 868 00
	Gibraltar Financial Corp. of Calif.	20 1/2	23,124.00	1,128	26 1/2		23 184 00
	Giddings & Lewis Inc.	12 3/4	12,750.00	1,000	13		13 000 00
	Guerdon Industries	18 3/4	9,375.00	500	18 7/8		9 437 50
	Hartford Fire Insurance Co.	51 1/4	25,625.00	500	50 1/8		25 062 50
	Heinicke Instrument Co.	10 3/8	5,187.50	500	10 1/4		5 125 00
	Intermountain Gas Co.	8 7/8	8,875.00	1,000	8 1/2		8 500 00
	Kaiser Aluminum & Chemical Corp.	38 3/8	38,375.00	1,000	38		38 000 00
	Lane Bryant Inc.	39 3/4	19,875.00	500	38 3/4		19 375 00
	Newmont Mining Corp.	36	18,000.00	500	36 1/8		18 062 50
	North American Coal Corp.	19 1/8	3,825.00	200	19 7/8		3 975 00
	Occidental Petroleum Corp.	23	11,500.00	500	22 1/2		11 250 00
	Phillips Petroleum Co.	24 1/4	4,825.00	200	23 3/8		4 675 00
	Purepac Laboratories Corp.	6 1/2	6,500.00	1,000	6 3/4		6 750 00
	RCA Corp.	30 3/4	15,375.00	500	30		15 000 00
	RCA Corp. $4 Com. Conv. Pfd.	72 1/4	18,062.50	250	73 1/4		18 312 50
	Reading & Bates Offshore Drilling Co. $1.375 Com. Conv. Pfd.			600	32		19 200 00
Rec'd	Richardson Co.	16 3/8	268,107.87	16,373	15 1/8		247 741 38
Rec'd	Rogers Corp.	32 1/4	123,195.00	3,820	32 5/8		124 617 50
	Rucker Company	8 3/4	3,500.00	400	9		3 600 00
	Ryan Homes Inc.	41 3/4	16,700.00	400	39 3/4		15 900 00
	Scott Paper Co.	32 7/8	16,437.50	500	33		16 500 00
	Simmonds Precision Products Inc.	6 1/8	6,875.00	1,000	6 1/2		6 500 00
	Sky City Stores Inc.	9 1/8	4,562.50	500	9 1/8		4 562 50
	Standard & Poor's Corp. (to be converted share for share into McGraw Hill Inc. $1.20 Conv. Pref.)			800	36		28 800 00
	Sundstrand Corp.	19 3/8	7,750.00	400	19 1/2		7 800 00
	Trans-Lux Corp.	17	3,400.00	200	16 1/4		3 250 00
	Unilever Ltd.	24 7/8	12,437.50	500	29 1/2		14 625 00
	United Aircraft Products Inc.	11 7/8	2,375.00	200	11 3/4		2 350 00
	Universal Oil Products Co.	34 7/8	6,750.00	2,000	35 1/8		70 250 00
		80 1/4	8,250.00	Par Value			
	Reading & Bates Offshore Drilling Co. Conv. 5-1/2% 1988			10,000	87 1/2		8 712 50
	Viatron Computer Systems Conv. 6-1/4% 1989			8,000	125		10 000 00
	Whittaker Corp. Conv. 4-1/2% 1988	50 1/4	1,005.00	2,000	51		1 020 00
					TOTAL		1 000 030 48

Exhibit "5" to Affidavit of A. George Sakellaropoulo

	Security			Shares	Price Close 4/8	Valuation
	L. P. FOLEY & COMPANY, INC. 13-097070-6					
Reid	First Pennsylvania Corp.			612	53¼	35 80
Reid	International Business Machines	18,937.00	326 1/2	58	317	18 79
Reid	Rogers Corp.	374,551.50	31 1/4	11,614	31 5/8	378 90
	Est	424,488.50		TOTAL		433 50
	JOHN P. FOLEY, JR. & ANNE A. FOLEY J/T 13-097063-6					
Reid	Brunswick Corp.	684,000.00	18	38,000	17¾	674 50
Reid	Harcourt, Brace & World Inc.	5,425.00	5 1/4	100	54¼	5 42
Reid	Rogers Corp.	614,298.00	31 1/4	19,048	31 5/8	601 44
		1,303,773.00		TOTAL		1301 36
	ANITA SALISBURY 13-096344-6					
Reid	American Chain & Cable Co.	2,787.50	27 7/8	100	77 5/8	7 96
Reid	Amicon Corporation			632	—	—
Reid	Brevel Products Corp.			100	9	900 00
Reid	Portec Inc.	1,700.00	17	100	16¾	1675 00
Reid	Richardson Co.	4,503.12	16 3/8	275	15 7/8	436 56
Reid	Wayne-Gossard Corp.	5050.00	12 5/8	400	12 5/8	5050 00
		14,040.62		TOTAL		14 95
		900.00				
		14 940.62				
				401c's TOTAL		749 850 36

Exhibit "G" to Affidavit of A. George Sakes

Exhibit "5" to Affidavit of A. George Saks

Security	*Shares*
JOHN P. FOLEY, JR.	
Allison Steel Manufacturing Co.	1,000
American General Insurance Co.	600
Amicon Corporation	27,250
Anaconda Co.	400
Arlan's Department Stores Inc.	1,000
Associated British Foods Ltd.	5,000
Beverly Hills Bancorp.	500
Block Engineering Inc.	1,000
Clark Oil & Refining Corp.	400
Evans Products Co. $4 Conv. Pfd.	926
Fairmont Foods Co.	500
Federal Resources Corp.	1,000
First Pennsylvania Corp.	408
Gibraltar Financial Corp. of Calif.	1,128
Giddings & Lewis Inc.	1,000
Guerdon Industries	500
Hartford Fire Insurance Co.	500
Heinicke Instrument Co.	500
Intermountain Gas Co.	1,000
Kaiser Aluminum & Chemical Corp.	1,000
Lane Bryant Inc.	500
Newmont Mining Corp.	500
North American Coal Corp.	200
Occidental Petroleum Corp.	500
Phillips Petroleum Co.	200
Purepac Laboratories Corp.	1,000
RCA Corp.	500
RCA Corp. $4 Com. Conv. Pfd.	250
Reading & Bates Offshore Drilling Co. $1.375 Com. Conv. Pfd.	600
Richardson Co.	16,373
Rogers Corp.	3,820

Exhibit "5" to Affidavit of A. George Saks

Security	*Shares*
Rucker Company	400
Ryan Homes Inc.	400
Scott Paper Co.	500
Simmonds Precision Products Inc.	1,000
Sky City Stores Inc.	500
Standard & Poor's Corp. (to be converted share for share into McGraw Hill Inc. $1.20 Conv. Pref.)	800
Sundstrand Corp.	400
Trans-Lux Corp.	200
Unilever Ltd.	500
United Aircraft Products Inc.	200
Universal Oil Products Co.	2,000
	Par Value
Reading & Bates Offshore Drilling Co. Conv. 5½% 1988	10,000
Viatron Computer Systems Conv. 6¼% 1989	8,000
Whittaker Corp. Conv. 4½% 1988	2,000
J. P. Foley & Company, Inc.	
First Pennsylvania Corp.	612
International Business Machines	58
Rogers Corp.	19,048
John P. Foley, Jr. & Anne A. Foley J/T	
Brunswick Corp.	38,000
Harcourt, Brace & World Inc.	100
Rogers Corp.	19.048
Anita Salisbury	
American Chain & Cable Co.	100
Amicon Corporation	632
Brevel Products Corp.	100
Portec Inc.	100
Richardson Co.	275
Wayne-Gossard Corp.	400

Affidavit of Leonard Feldman in Opposition to Motion to Dismiss Involuntary Petition in Bankruptcy and in Support of Cross-Motion for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

LEONARD FELDMAN, being duly sworn, deposes and says:

I am a member of the Bar of the State of New York and acted as the attorney for petitioners in the course of certain of their negotiations with the Alleged Bankrupt, Blair & Co., Inc. I represented the petitioners from the beginning of the year 1970, right on up until the filing of the Involuntary Petition.

With rare exceptions, I accompanied John P. Foley, Jr., in his dealings with the Alleged Bankrupt and accompanied him on every occasion prior to April 4, 1970, the date when the petitioners entered into their agreement with Blair & Co., Inc.

At no time prior to April 4, 1970, did I ever deal with or negotiate with A. George Saks. I do not recall ever discussing any matter with Mr. Saks, and I know that Dr. Foley did not. I do recall being introduced to a young gentleman, who, I believe was described to me as the enforcement attorney for Blair & Co., Inc., and who, I believe, bore the name Saks.

Affidavit of Leonard Feldman in Opposition to Motion and in Support of Cross-Motion

All of my dealings were with John Richardson, Esq., an officer and general counsel to Blair & Co., Inc.; James Ramsey, the President of Blair & Co., Inc.; George Morpurgo, the Executive Vice-President of Blair & Co., Inc.; James Ruah, the Financial Vice-President of Blair & Co., Inc.; Benjamin Hepburn, The Treasurer of Blair & Co., Inc.; Oliver Vanderbilt, the Chairman of the Board of Blair & Co., Inc.; and Norman Segal of the firm of Mudge, Rose, Guthrie & Alexander, Esqs., attorneys for Blair & Co., Inc.

The facts hereinafter set forth were disclosed to me by one or more of the foregoing individuals. At no time did a Mr. Saks ever disclose any information to me or was Mr. Saks described as participating in the events hereinafter related.

One of the acts of bankruptcy claimed is an alleged preferential transfer to one Melville H. Ireland, an officer, director and subordinated lender of the Alleged Bankrupt

I was informed by Mr. Richardson that Mr. Ireland was a subordinated lender to Blair & Co., Inc., in the same manner as the petitioners.

I was at all times told, with regard to Mr. Ireland, that he occupied the same relative position as the petitioners did and that he would be treated the same way as the petitioners were.

In August of 1970, all of the subordinated lenders of Blair, who still retained securities as collateral for their subordinated loans, were liquidated by Blair & Co., Inc., and the full proceeds of that liquidation kept by Blair & Co., Inc., for the uses of Blair & Co., Inc. I do not now enter into the question as to the propriety of that liquidation.

Affidavit of Leonard Feldman in Opposition to Motion and in Support of Cross-Motion

On September 10, 1970, at a meeting at which Mr. Richardson, Mr. Ramsey and a number of others were present, Mr. Ramsey suddenly announced, in response to a question raised by me, that whereas all of the other subordinated holders had been liquidated to 100% of the market value of their securities, Mr. Ireland had been liquidated to the extent of only 70% of his securities, so that in effect, he received a 30% preference at the time of liquidation. I had asked Mr. Richardson to supply me with a list of the persons whose securities had been liquidated up to September 10, 1970, and Mr. Ireland's name appeared nowhere on that list. A copy of the letter of transmittal and the list supplied by Mr. Richardson is annexed hereto and made a part hereof as Exhibits A and A1.

The reason for the omission of Mr. Ireland from this list may reasonably be surmised to be the fact that inclusion of Mr. Ireland in this list would either require a false statement or if truly set forth, establish the preference of Mr. Ireland, who was an insider and by far the largest insider investor in Blair as of September, 1970.

It would be interesting for the Court to also know that at the very time that Mr. Vanderbilt was busy soliciting for people such as the petitioners to invest in Blair & Co., Inc., he was withdrawing his own investment and did so to the extent of $1,400,000., in November of 1969, a time when the figures suggest that Blair & Co., Inc., was already insolvent.

With regard to the third act of bankruptcy,—the "Blair Fund Contract", I would most respectfully inform the Court that Mr. Richardson told me that the reason why the stock

Affidavit of Leonard Feldman in Opposition to Motion and in Support of Cross-Motion

of Blair Advisory Co., Inc., had never been transferred was that a governmental agency had raised a question regarding the transaction, and that approval of the transaction would in all likelihood be withheld. He also informed me that Mr. Wygod took the position that Mr. Wygod was ready, willing and able to perform, had performed and was refusing to return the $100,000., that the Alleged Bankrupt had given Wygod to induce him to enter into the agreement. In other words, a specific waste of $100,000., was caused by Blair & Co., Inc. The attempt by Mr. Saks to suggest that this was some sort of a contract regarding Blair Advisory is misleading. The actual contract was entered into by the Alleged Bankrupt to transfer and sell the stock of its 100% owned subsidiary, Blair Advisory Co., Inc., and we deal here with an asset of the Alleged Bankrupt. I requested Mr. Richardson to send me a copy of that contract, and he did so. As a matter of fact, he delivered this contract to me one day before the Petition in Bankruptcy was filed. A copy of that contract is annexed hereto and made a part hereof as Exhibit B.

LEONARD FELDMAN

[Jurat omitted in printing.]

EXHIBIT "A" ANNEXED TO AFFIDAVIT OF LEONARD FELDMAN

(Letterhead of Blair & Co., Inc., New York, N.Y. 10005)

September 10, 1970

Leonard Feldman, Esq.
2 Pennsylvania Plaza, Room 2515
New York, New York 10001

Dear Leonard:

In compliance with the request of you and the other members of the committee representing subordinated creditors, I enclose the following:

1. Copy of By-laws of Blair & Co., Inc. as amended to date;

2. Parts I and II of the September 26, 1969 Answers to Financial Questionnaire with reports of certified public accountants, Arthur Young & Company, covering their audit of the "Blair Division" of Blair & Co., Inc.;

3. Schedule of release and/or reduction of subordinated debt during the period from August 31, 1969 to date; and

4. Copy of Employment Agreement dated April 21, 1970 with George Morpurgo.

I have asked Ray Vreeland to furnish to you the papers relating to the subordinated accounts of Mel Ireland.

Exhibit "A" to Affidavit of Leonard Feldman

I will be out of town tomorrow but will be back in the office on Monday, when I will undertake to locate and send to you the remaining items you requested.

Sincerely yours,

/s/ JOHN B. RICHARDSON
John B. Richardson

JBR:AS

Enclosures
as stated

HAND DELIVERY

RELEASE AND/OR REDUCTION OF SENIOR SECURITIES
PERIOD 5/31/69 TO DATE

SECURED DEMAND NOTES	DATE OF RELEASE	VALUE AT TIME OF RELEASE
STEPHEN T MONAGHAN	9/4/69	25000 -
IRA HARRIS	9/11/69	24000 -
WILLIAM H. LEHMAN	10/31/69	24691 -
ODELL B. GRESSETT	12/1/69	37500 -
STEPHEN T. MONAGHAN "	11/26/69	54136 -
"	11/26/69	36558 -
"	11/26/69	47787 -
MARGUERITE R. WARFIELD	11/26/69	104736 -
RITA ADAMS	11/26/69	81750 -
BUCK ROSS	11/26/69	188751 -

RELEASE AND REDUCTION OF SENIOR SECURITIES
PERIOD 5/31/69 TO DATE

	DATE OF RELEASE	VALUE AT TIME OF RELEASE
SECURED DEMAND NOTES:		
STEPHEN T. MONAHAN	9/4/69	25000 -
JIKA HARRIS	9/15/69	26000 -
WILLIAM H. LEHMANN	10/31/69	74691 -
ADELE B. GREELY	12/1/69	37500 -
STEPHEN T. MONAHAN	11/26/70	54136 -
"	11/20/70	36558 -
"	11/20/70	47737 -
MARGUERITE R. WARFIELD	11/20/70	104736 -
RITA ADAMS	7/17/70	81750 -
DAVID ROSS	7/17/70	188751 -
ALBERT F. BERINGER	3/31/70	131000 -
ST. LAURENCE M. SYMMES	3/31/70	17787 -
ALICE T. BERINGER	4/27/70	15398 -
BENJAMIN V. HARRISON, JR	4/30/70	177775 -
MARY KROMFELD	4/30/70	170396 -
WILLIAM M CHAPIN, JR	5/29/70	713830 -
CLARENCE E. HELLIE	5/29/70	178976 -
CHARLES F. LOWREY	5/29/70	179933 -
JACOB G. SCHURMAN III	5/29/70	300344 -
ALBERT E. SCHWABACHER, JR	5/29/70	1778054 -
PETER B. VALENTINE	5/29/70	64817 -
		4147614 -
SUBORDINATED DEBENTURES:		
OLIVER DE G. VANDERBILT	11/1/69	700000 -
DO	11/28/69	700000 -
SIMON ZUCKERMAN	7/13/70	75000 -
JOHN GRANDEN, TRUSTEE U/LAST WILL BECKER	3/31/70	75000 -
BENJAMIN V. HARRISON, JR	4/30/70	700000 -
JACOB G. SCHURMAN III	5/29/70	60000 -
WALTER SCHURMAN	5/29/70	50000 -
		1760000 -

EXHIBIT "A" ANNEXED TO AFFIDAVIT OF LEONARD FELDMAN

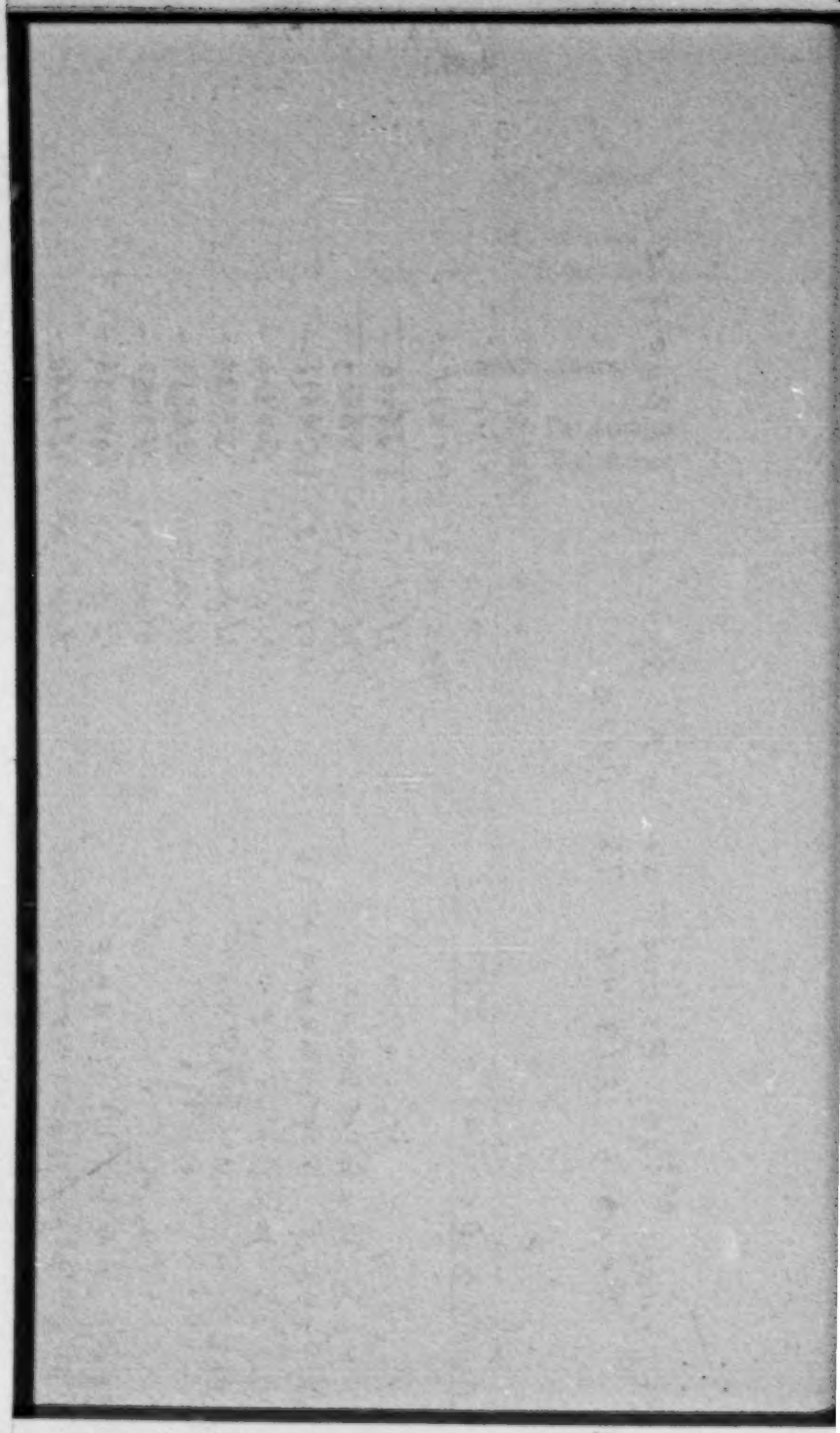

EXHIBIT "B" ANNEXED TO AFFIDAVIT OF LEONARD FELDMAN

AGREEMENT dated as of August 7, 1970, between Blair & Co., Inc., a Delaware corporation ("Seller") and Martin J. Wygod, New York, N. Y. ("Purchaser").

WHEREAS, Seller owns all the outstanding shares of the capital stock of Blair Advisory Co., Inc., a Delaware corporation ("Adviser"), and Purchaser desires to acquire, and Seller desires to sell, all such shares;

WHEREAS, at the request of Seller, Purchaser on the date hereof has loaned certain securities, pursuant to an agreement dated the date hereof between Thomson & McKinnon Auchincloss Inc. and the Purchaser (the "Securities Loan Agreement");

WHEREAS, the obligation of the Purchaser to purchase the stock pursuant to this Agreement is subject to certain conditions, and the Purchaser and Seller, recognising that such conditions may not be fulfilled, desire to make provision to compensate the Purchaser in the event that, for any reason other than a default by the Purchaser, the closing under this Agreement does not take place;

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein and of the loan made by the Purchaser pursuant to the Securities Loan Agreement the parties hereto do hereby agree as follows:

1. *Purchase and Sale.*

A. Subject to the provisions of this Agreement, the Seller agrees to sell to the Purchaser, and the Purchaser

agrees to purchase from the Seller, on the Closing Date referred to below and at the purchase price of Twenty-five thousand Dollars ($25,000), One thousand (1,000) shares of Common Stock, par value $1, of Adviser (the "Stock"). The closing for the purchase and sale of the Stock shall take place on the Closing Date referred to below, in the offices of Seller at 20 Broad Street, New York, N. Y. at 10:00 A.M. New York Time. The Closing Date shall be the business day next following the approval by the holders of a majority of the outstanding stock of The Blair Fund, Inc. (the "Fund"), of the New Management Contract refered to in Section 2 hereof; provided, however, that if the Purchaser dies before said day and as of said day there shall not be any person qualified as the executor or administrator of the Purchaser, then the Closing Date shall be the fifth business day following the qualification of the executor or administrator of the Purchaser (the obligation of the Seller to close on said day being subject to the receipt by the Seller of notice by said executor or administrator of his qualification). At the closing (a) the Seller shall deliver to the Purchaser a certificate representing the Stock, in negotiable form and (b) the Purchaser shall deliver to the Seller (i) a bank cashier's or certified check payable to the order of Seller in the amount of the purchase price, and (ii) the funds and securities constituting the Escrow Fund established pursuant to paragraph B of this Section 1.

B. At the time of the execution of this Agreement, Seller has deposited with the Purchaser funds in the amount of One Hundred Thousand Dollars ($100,000) (the "Escrow Fund"). Any income received by the Purchaser

in respect of the funds so deposited shall be added to the Escrow Fund and shall be held and disposed of as part of the Escrow Fund. The Purchaser

The proposed investment advisory and management contract between the Fund and Adviser (the "New Management Contract") will be set forth in the proxy statement for the meeting of the Fund shareholders. The New Management Contract shall contain substantially the same terms as the Existing Management Contract, with such changes and additions, not inconsistent with applicable law, as the Purchaser may reasonably determine.

3. *Representations and Warranties of Seller.*

Seller represents and warrants to Purchaser as follows:

(a) Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, having full legal right and power to sell the Stock to the Purchaser pursuant to this Agreement; Seller is the owner, free and clear of any lien, claim, option, charge or encumbrance, of all the shares of the Stock, and such shares are validly issued, fully paid and non-assessable; the execution on behalf of the Seller of this Agreement has been duly authorized by the Board of Directors of the Seller; and neither the sale to the Purchaser of the Stock pursuant to this Agreement not the retention by the Purchaser of the Escrow Fund if the closing does not take place, will violate any provision of the charter or by-laws of the Seller or the Adviser, or conflict with or result in

any breach of any provision of, or constitute a default under, any agreement or instrument, or any regulation of a national securities exchange, binding on the Seller or Adviser.

(b) Seller is not insolvent, as defined in the Bankruptcy Act, and the deposit with the Purchaser of the Escrow Fund does not render Seller insolvent.

(c) Adviser is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and is duly qualified to do business in the State of New York, which is the only jurisdiction in which such qualification is necessary; the authorized capital of Adviser consists of 1,000 shares of Common Stock, $1 par value, all of which have been validly issued and are outstanding and are fully paid and non-assessable, and 900 shares of Class A Non-Voting Stock, $1 par value, of which none has been issued. There are no outstanding options or other rights to acquire shares of the capital stock of Adviser of any class, or any outstanding securities or other instruments convertible into such shares.

(d) The Fund is an open-end non-diversified investment company of the management type registered under Section 8 of the Investment Company Act of 1940. Adviser serves as investment adviser of the Fund pursuant to an Investment Advisory Contract dated March 29, 1967, between the Fund and the Adviser (the "Existing Management Contract"), which is in full force and effect in accordance with its terms. Adviser is not in default with respect to any of its obligations under the Existing Management Contract. Seller acts as distributer and underwriter of shares of the

Fund, pursuant to an amended distributing agreement between the Seller and the Fund which was last approved by the Board of Directors of the Fund on March 31, 1970 (the "Distributing Agreement"). The Distributing Agreement is in full force and effect in accordance with its terms and Seller is not in default with respect to any of its obligations thereunder.

(e) Seller has furnished to the Purchaser a copy of the balance sheet of Adviser as of December 31, 1969, and of the related report of Arthur Young & Company, dated February 6, 1970 (the "December 31st Balance Sheet"). Said balance sheet is in accordance with the books and records of Adviser, has been prepared in accordance with generally accepted accounting principles consistently applied, and fairly represents the financial position of Adviser as of the date thereof.

(f) The only contracts to which Adviser is a party or pursuant to which Adviser has any direct, indirect or contingent liability or obligation are (i) the Existing Management Contract, and (ii) the Agreement dated April 19, 1967 between Adviser and Seller, pursuant to which the Seller furnishes to Adviser certain services and Facilities ("Service Contract"). There are no sums due to or from the Adviser pursuant to the Existing Management Contract or the Service Contract other than as may be reflected on the December 31st Balance Sheet or as may have arisen since that date in the ordinary course of business, or as may arise in the ordinary course of business between the date hereof and the Closing Date.

Exhibit "B" to Affidavit of Leonard Feldman

(g) Except as reflected on the December 31st Balance Sheet or as incurred in the ordinary course of business since that date, Adviser is not subject to any liabilities, obligations or commitments (contractual, contingent or otherwise) of any kind to any party. Adviser is not in default in respect of any of its liabilities, obligations and commitments.

(h) Since December 31, 1969, there has not been any change in the condition (financial or otherwise), assets, liabilities, commitments, business or properties of Adviser (other than changes in ordinary course of business none of which has been materially adverse).

(i) There is not any litigation, proceeding or governmental investigation pending or, to the knowledge of the Seller, threatened against the Adviser or the Fund, or against Seller with respect to the affairs of the Fund.

4. *Representations and Warranties of Purchaser.*

Purchaser represents and warrants to Seller that the purchase of the Stock pursuant to this Agreement will not conflict with or result in a breach of any provision of, or constitute a default under, any agreement or instrument binding on the Purchaser.

5. *Conditions to Obligation of the Purchaser.*

The obligation of the Purchaser to purchase the Stock pursuant to this Agreement is subject to the following conditions:

(a) The representations and warranties of the Seller contained in this Agrement were true when made and

(except as to the representation and warranty contained in Section 3(b) hereof) shall be true at and as of the Closing Date as though such representations and warranties had been made at and as of the Closing Date (except to the extent that such representations and warranties shall be incorrect as of the Closing Date because of events or changes occurring after the date hereof which are contemplated by this Agreement, or which have been approved by the Purchaser in writing), and the Seller shall have performed all covenants and agreements in this Agreement on its part required to be performed.

(b) No action or proceeding shall be instituted or threatened at any time prior to the Closing on the Closing Date before any court or other governmental body by any person or public authority (i) seeking to restrain or prohibit the consummation of the transactions in this Agreement or seeking damages or other relief in connection with this Agreement, or (ii) an adverse determination of which would have a materially adverse effect on the ability of the Adviser to engage in the business of providing investment advisory services, or would have a materially adverse effect on the financial condition of the Adviser or the Fund.

(c) The Purchaser shall have received an opinion of Messrs. Mudge Rose Guthrie & Alexander, New York, New York, dated the Closing Date, in form and substance satisfactory to the Purchaser and its counsel confirming as of the Closing Date the opinion delivered to the Purchaser by such counsel in connection with the execution of this Agreement and to the effect that upon delivery of the Stock to Purchaser, and payment therefor, Purchaser will receive

good title to the Stock free and clear of any liens, claims or encumbrances other than those of which Purchaser has knowledge.

(d) On or before October 7, 1970, the New Management Contract shall have been approved by the Board of Directors of the Fund and by vote of a majority of the outstanding voting securities of the Fund, and there shall have been elected as directors constituting the whole Board of Directors of the Fund, for terms commencing immediately upon the Closing under this Agreement, persons designated by the Purchaser.

(e) At all times from the date hereof until the Closing Date, the Existing Management Contract shall have remained in full force and effect and Adviser shall have served as Investment Adviser of the Fund pursuant thereto.

(f) The aggregate amount of the liabilities of Adviser as of the Closing Date shall not exceed the sum of (i) the amount of the funds in bank accounts of Adviser on the Closing Date, and (ii) the amount accrued, as of the close of business on the day before the Closing Date, under the Existing Management Contract.

(g) There shall be delivered to the Purchaser at the closing the resignations as of the Closing Date of the directors and officers of Adviser.

6. *Conditions to Obligation of Seller.*

The obligation of the Seller to sell the Stock pursuant to this Agreement is subject to the following conditions:

Exhibit "B" to Affidavit of Leonard Feldman

(a) The representations and warranties of the Purchaser contained in this Agreement were true when made and shall be true at and as of the Closing Date as though such representations and warranties had been made at and as of the Closing Date, and the Purchaser shall have performed all covenants and agreements on his part required to be performed in this Agreement.

(b) No action or proceeding shall be instituted or threatened at any time prior to the closing on the Closing Date before any court or other governmental body by any person or public authority seeking to restrain or prohibit the consummation of the transactions provided for in this Agreement, seeking damages or seeking other relief in connection with this Agreement.

(c) On or before October 7, 1970, the New Management Contract shall have been approved by the Board of Directors of the Fund and by vote of a majority of the outstanding voting securities of the Fund.

(d) The Purchaser shall have furnished to the Seller the consent of the Purchaser to the cancellation of the Service Agreement effective upon the purchase of the Stock pursuant to this Agreement.

7. *Covenants of Seller.*

(a) The Seller agrees that prior to the Closing Date Adviser will not encumber any asset or enter into any transaction or make any commitment otherwise than in the ordinary course of business.

(b) Notwithstanding any investigation of the business of Adviser made by or on behalf of the Purchaser prior to the Closing Date, the Seller will defend, indemnify and hold harmless the Purchaser and Adviser from, against and in respect of (i) all damages, losses and expenses arising out of any breach of warranty, incorrect representation, or non-fulfillment of any agreement, of the Seller contained herein, (ii) any and all liabilities, loss or damage arising from the assertion of any claim that the sale to the Purchaser of the Stock pursuant to this Agreement is unlawful or invalid, (iii) any and all liabilities, loss or damage arising out of any acts or omissions of the Seller in respect of Adviser or the Fund, at any time on or before the Closing Date; and (iv) the amount, if any, by which the liabilities of Adviser as of the Closing Date shall exceed the sum of amounts accrued under the Existing Management Contract for advisory services to the day before the Closing Date and the amount of funds in bank accounts of Adviser as of the Closing Date.

8. *Miscellaneous.*

(a) From and after the date of this Agreement, the Seller shall afford to the authorized representatives of the Purchaser free and full access to the books, records and files of Adviser and the Fund.

(b) Seller and Purchaser shall each pay its own expenses incurred in connection with the preparation and performance of this Agreement including all fees of counsel and accountants, and the Seller shall, in addition, reimburse the Fund, in the event it shall call the special meeting

of shareholders referred to in Section 2 of this Agreement, for all reasonable printing, mailing and solicitation costs incurred by it which are attributable to such special meeting, as well as reasonable legal and auditing fees and disbursements incurred by it in connection therewith.

(c) Purchaser and Seller agree not to issue any press release or other public communication with respect to the transactions contemplated hereby without first having obtained the consent of the other thereto.

(d) (i) The Purchaser agrees to use his best efforts to cause to be presented for the consideration of the Board of Directors of the Fund a proposal for the termination of the Distributing Agreement, effective as of a date not later than 30 days after the Closing Date and for the entering into by the Fund with a person other than the Seller of a new distribution agreement. Seller agrees that, at the request of the Fund, it will consent to such a termination of the Distributing Agreement.

(ii) Seller agrees that, in the event the closing does not take place on or before October 8, 1970 for any reason other than a default by the Purchaser in the performance of his obligations under this Agreement, and on or before December 31, 1970 Seller shall enter into an agreement for the sale of the Stock to a person other than the Purchaser, for a consideration in cash or other property of a value exceeding $25,000, promptly after receipt of such consideration Seller will pay to the Purchaser in cash an amount equal to the excess, if any, of the consideration so received over the sum of (i) the amount of the Escrow

Exhibit "B" to Affidavit of Leonard Feldman

Fund retained by the Purchaser pursuant to Section 1B of this Agreement and (ii) $25,000.

(e) Anything in the Agreement directly or indirectly to the contrary notwithstanding, the Purchaser shall not have any rights or powers in respect of Adviser, nor shall legal nor beneficial title to any of the Stock pass to Purchaser, nor shall there be any "assignment" (within the meaning of the Investment Company Act of 1940, as amended) of the Existing Management Contract unless and until (i) the New Management Contract shall have been approved by a majority of the outstanding voting securities of the Fund, and (ii) the Stock shall have been transferred to the Purchaser and all documents executed and actions taken which may be necessary completely to effect such transfer.

(f) All terms and provisions of this Agreement shall be binding upon and inure to the benefit of, and be enforceable by the successors and assigns of Seller and the heirs, legal representatives, successors and assigns of the Purchaser.

(g) All representations and warranties made in this Agreement shall survive the closing hereunder and any investigation at any time made by or on behalf of the Purchaser.

(h) Any notice given pursuant to the terms hereof shall be mailed by certified mail, return receipt requested, to the parties as follows:

Exhibit "B" to Affidavit of Leonard Feldman

(i) If to Seller, to:

Blair & Co., Inc.
20 Broad Street
New York, New York 10005

(ii) If to Purchaser, to:

Martin J. Wygod
100 Wall Street
New York, New York 10005

(i) This Agreement constitutes the entire agreement and understanding between the parties hereto with respect to the purchase of the Stock by the Purchaser, and this Agreement may be amended by and only by a written instrument executed by the Purchaser and Seller or their successors and assigns.

(j) This Agreement shall be construed and enforced in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties have duly executed this Agreement as of the date first above written.

BLAIR & CO., INC.

By /s/ JAMES B. RAMSEY, JR.

Martin J. Wygod
/s/ MARTIN J. WYGOD

Affidavit of John P. Foley, Jr., in Opposition to Motion to Dismiss Involuntary Petition in Bankruptcy and in Support of Cross-Motion for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 70 B 755

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

JOHN P. FOLEY, JR., being duly sworn, deposes and says:

I am one of the Petitioning Creditors herein and make this affidavit in opposition to Alleged Bankrupt's motion to dismiss the Petition in Bankruptcy. I also respectfully request this Court, by way of cross-motion, and pursuant to Rule 56(b) of the Federal Rules, for summary judgment adjudicating the Alleged Bankrupt as a Bankrupt by reason of the fifth act of bankruptcy as alleged in the petition as to which there is no triable issue of fact.

At the very outset, I must respectfully point out to the Court that although the answer of the Alleged Bankrupt apparently denies insolvency, the affidavit and the documents submitted in support of the motion for summary judgment make no reference to that issue, and the Court may presume that Blair & Co., Inc., does not dispute that allegation on this motion. However, in support of my contention that insolvency existed on the date of the filing

of the petition, I submit herewith a photostatic copy of a balance sheet of Blair & Co., Inc., as of June 30, 1970, marked Exhibit I, which was furnished to me by Mr. Rush of Blair & Co., Inc. (the markings are mine), which clearly reveals that the capital stock and surplus of the Alleged Bankrupt showed a deficit of $10,000,000., and it was only the subordinated borrowings of $20,000,000., that permitted this company to maintain a capital position. It is my understanding, and has always been my understanding, through my many years in the financial world that subordinated borrowings, although subordinated to other creditors are, nonetheless, liabilities of the company, and in that respect, this company had more liabilities than it had assets and was consequently insolvent.

Aside from the question of the financial statement, which was prepared by Blair & Co., Inc., and not by me, any doubt about Blair's financial straits would be an imposition on what is generally public knowledge. It would be redundant to attach to these moving papers the newspaper reports throughout the months of August and September reporting the difficulties of Blair & Co., Inc., the fact that it was compelled to sell off many of its branches to another company, the fact that the New York Stock Exchange directed Blair & Co., Inc., to terminate trading and the fact that the New York Stock Exchange publicly announced that it was apparent that the highly publicized trust fund created by the New York Stock Exchange, created to aid the customers of Blair & Co., Inc., was to be drawn upon for the purpose for which it was originally created. It was ordinary public knowledge during August and Sep-

tember, 1970, that Blair & Co., Inc., could not pay its debts, and the very fact that Blair was compelled to and did liquidate the collateral posted by its subordinated lenders is ample indication of the fact that its liabilities exceeded its assets, and that it was unable to pay its debts as they matured. I do not think the question of insolvency is at issue in this case, despite the denial set forth in the answer, and I leave further discussion of that question to the attorneys representing the various parties.

The affidavit of A. George Saks submitted in support of the motion for summary judgment contains much in the way of platitudes that are not particularly pertinent to this motion. We are well aware of the fact that Blair & Co., Inc., was engaged in the stock brokerage business and the number of customer accounts may be interesting, but has no relevancy to the question of whether or not Blair & Co., Inc., is or is not insolvent, and has or has not committed one of the acts of bankruptcy alleged in my petition. Suffice it to say that I have no interest or desire to harm any customer of Blair & Co., Inc. I fully recognize the fact that my position as a creditor of Blair & Co., Inc., is subordinate to the rights of the customers who relied upon and trusted the management of that concern, and I fully recognize the fact that insofar as the management of Blair may have liquidated the securities that I posted as collateral for the Secured Demand Note that I executed is concerned, my right to reimbursement or repayment therefor will be treated by these Courts as subordinate to the rights of these customers. I do not, however, so concede as to the securities pledged by me as collateral

which have not yet been liquidated by the management of Blair, but I make this reservation purely for the Record as it is and will be the subject of other litigation and is equally of no importance to the issues before this Court in the particular proceeding seeking an adjudication of Blair & Co., Inc., as a Bankrupt. I, therefore, respectfully urge this Court to disregard all of the detail regarding a public concern in the disposition of this matter, as I have been advised by counsel and verily believe that if Blair & Co., Inc., was insolvent and had committed an act of bankruptcy as of the date the petition was filed, adjudication must follow, regardless of any question of public concern.

Mr. Saks is in error in contending that my petition alleges only two acts of bankruptcy. Whoever examined the petition did not examine it with due care. Three acts of bankruptcy were alleged, except that in the second act of bankruptcy, an amount was inadvertently left out. The Court may note that subdivisions (c), (d) and (e) of paragraph 4 of the petition were crossed out with diagonal typed lines, but subdivision (b) was not crossed out. I am advised that my attorney has already moved this Court for leave to insert the missing amount, which we reasonably expect will be granted pursuant to Rule 15 and General Order 11, and, when granted, this second act of bankruptcy will read as follows:

"(b) while insolvent transferred property and various moneys amounting in the aggregate to the value or sum of $5,000,000., to various creditors with intent thereby

to prefer such creditors over other creditors of the same class, the names of the creditors receiving such preference being unknown to your petitioners."

The background to this allegation, which in and of itself is sufficient to defeat the Alleged Bankrupt's motion for summary judgment, as it is unquestionably an issue of fact, arises out of the following facts and circumstances, some of which are known to me at this time and some of which are believed to be true, although the evidence in support thereof must be gleaned from the testimony of the personnel and the records of the Alleged Bankrupt:

On or about the 3rd day of April, 1970, I was induced by representations not particularly pertinent here, to become what is broadly referred to as a subordinated lender, sometimes referred to as a subordinated debenture holder, and most properly a lender of a Secured Demand Note to Blair & Co., Inc. My corporation and I, together with Anita Salisbury, executed a demand note to Blair & Co., Inc., on that date, promising to pay the sum of $3,784,349., to Blair & Co., Inc., upon demand. The note was secured by the pledge of securities and cash more fully described and itemized and valued at the sum of $2,749,850.36 as of the close of the market of April 8, 1970. The execution of this document and the pledge of the collateral was accompanied by a collateral agreement ten pages long, which had been prepared by Blair & Co., Inc., or their attorneys, which carefully and in painstaking detail spelled out the rights of the parties.

Within ninety days after I had executed the aforementioned note and collateral agreement, and had posted se-

curities which I had painfully accumulated over many years of careful investing, I learned to my regret that I had probably been mislead through misrepresentations and the like, which, admittedly, are not pertinent here, and I retained my attorney, Leonard Feldman, Esq., to assist me in attempting to retrieve what was apparently a very poor investment. I mention this because from that point forward, Mr. Feldman and I, together with other subordinated lenders, whose claims against Blair & Co., Inc., total approximately $21,000,000., formed ourselves into an Ad Hoc Committee and met with the officers and the counsel of Blair & Co., Inc., continuously, and insisted upon and received copies of documents and reports, keeping a careful check as to what was happening in Blair & Co., Inc., because it became absolutely clear that Blair & Co., Inc., was existing only upon the cushion of our subordinated debentures, and that it was liquidating the securities posted as collateral by the subordinated lenders while taking steps and making maneuvers over which we had no control, despite the fact that it was our assets that were being dissipated, while Blair & Co., Inc., hopelessly insolvent and with its capital completely wiped out, sought to salvage what it could from a dying business.

One of the executives of Blair & Co., Inc., was a party named Melville H. Ireland. According to a chart of the subordinated debenture holders and lenders of Secured Demand Notes furnished to me by Blair & Co., Inc., Mr. Ireland was listed as a debenture holder in the sum of $2,462,391.34, and as a lender of Secured Demand Notes, which was my category, in the sum of $144,915.22.

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At a conference that took place at Blair & Co., Inc., on September 10, 1970, during a period of time when I was desperately trying to salvage my position and had already gone into the State Supreme Court for an injunction, and through an Arbitration under the rules of the New York Stock Exchange, which efforts were strenuously opposed by Blair & Co., Inc., and their attorneys, Mr. Ramsey and Mr. Vanderbilt, the executive heads of Blair & Co., Inc., blithely informed me that Mr. Ireland's position had been liquidated at 70% of its value, permitting Mr. Ireland, an insider, to salvage 30% of the amount of his securities, whereas, I, an outsider, was being bitterly opposed in any attempt to salvage any portion of my position.

At that same meeting, Mr. Feldman and I demanded to know who else had been accorded the privilege of withdrawing any, or part of their securities, which had been pledged with Blair & Co., Inc., and as a result of our demand, we received a schedule showing the release and/or reduction "of senior securities" which revealed that as of the date of release of May 29, 1970, approximately $3,000,000., of either Secured Demand Notes or subordinated debenture holders had either been released or reduced. I do not vouch for the accuracy of that date, and I respectfully submit to this Court that I am entitled to interrogate and investigate into the authenticity of that date.

As a commentary, although not particularly pertinent to the issue, except as it reflects upon them, it should be noted that this self-same list reveals that Oliver De G. Vander-

bilt, one of the chief executive officers of Blair & Co., Inc., obtained a release or reduction of subordinated debentures totalling the sum of $1,400,000.00 in November, 1969, and I am prepared to prove it at the proper time to the proper Court that Blair & Co., Inc., was probably legally insolvent as of September 26, 1969, in that, considering the subordinated lenders as creditors, its liabilities exceeded its assets.

It is apparent, therefore, that insofar as the Alleged Bankrupt's motion for summary judgment is concerned, an issue of fact may exist as to this act of bankruptcy, except that the Alleged Bankrupt may not be able to deny these facts, in which case, adjudication should follow as a matter of law.

I now address myself to the specific points raised by Mr. Saks.

Mr. Saks alleges that the first alleged act of bankruptcy is wholly untrue. Mr. Saks is dissembling in making that statement, because if he, as a representative of Blair & Co., Inc., is familiar with the facts, he would very well know that whatever the form of the agreement may have been, the intent of the agreement was to sell the Management Contract of the Blair Fund. A copy of the contract is a part of these answering affidavits as an exhibit to Mr. Feldman's affidavit, marked Exhibit B, and the Court is respectfully urged to read the contract and decide for itself whether Mr. Saks is playing with words, or really means what he says.

I can also advise the Court that the Blair Fund, Inc., called a special meeting of its stockholders to be held on

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September 22, 1970, for the express purpose of considering a new Investment Advisory Contract with Blair Advisory Co., Inc., and in the Proxy Statement, a resume of the Investment Advisory Contract is set forth. Copy of that portion of the Proxy Statement is annexed hereto and made a part of this affidavit and marked Exhibit II, and the attention of the Court is directed to the beginning of the second paragraph which states:

> "The transfer of stock in the Adviser by Blair to Mr. Wygod will constitute an assignment of the present Investment Advisory Contract between the Fund and the Adviser, and will result in a termination of that Contract and of the relationship pursuant to which the Fund receives investment advice on a regular basis from the Blair organization. Under the Agreement, the approval of a new Investment Advisory Contract by vote of a majority of the outstanding voting securities of the Fund is a condition precedent to the transfer of that stock to Mr. Wygod."

As a matter of fact, in July, 1970, when Mr. Oliver Vanderbilt, mentioned above as one of the principal officers of Blair, told me personally in a conversation held with him at the Racquet Club that Blair was about to sell the Management Contract as part of a larger deal for a transfer of the branches of Blair & Co., Inc., to Thomson & McKinnon Auchincloss Inc., in which Mr. Wygod was deeply involved in a manner which may or may not be pertinent here, he made no reference to the stock of Blair Advisory Co., Inc. His remarks were pointed and clear, and there

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was no mistaking what he said, and that was that in order to induce Mr. Wygod to go along with the transaction with Thomson & McKinnon Auchincloss Inc., the pot was being sweetened by permitting him to buy the Management Contract for $25,000., with a $100,000., commitment to secure the contract.

In this connection, the Court is respectfully referred to paragraph 1A. of the agreement (Ex. B) which sets forth the purchase price at $25,000., (despite the fact that in 1969, Blair received income in excess of $1,350,000., from its wholly owned subsidiary, Blair Advisory). It should be noted that the Proxy Statement also specifically reveals that Mr. Wygod, the alleged purchaser, provided $1,500,000., in capital to Thomson & McKinnon as part of the sale of fourteen of Blair's offices to Thomson & McKinnon. It might also be parenthetically stated at this juncture, that a number of the officers of Blair & Co., Inc., are presently in the employ of the aforesaid Thomson & McKinnon Auchincloss Inc.

Of particular importance here is paragraph 1B of this agreement, which reveals that Blair & Co., Inc., the Alleged Bankrupt, deposited $100,000., with Mr. Wygod, subject to the provision that if the closing did not take place on or about October 8, 1970, the purchaser was to retain that sum or its equivalent. I have been advised by my attorney that the statement was made on the occasion of the argument of the motion for the appointment of a Receiver that the sale of the stock of the corporation and the management fund did not go through, that the special meeting of stockholders of the Blair Fund Inc., had been cancelled

and had never been held, and that Mr. Wygod, to this day, has retained the $100,000., contending that he was at all times ready, willing and able to perform the contract, that he had not defaulted on the contract, and was, therefore, entitled to keep the aforesaid sum as liquidated damages.

When Mr. Saks states in his affidavit that the transfer of the stock of the advisory company was never effected, he may be correct insofar as that statement goes, but the fact is that $100,000., has been transferred with the intent to defraud creditors, for no consideration, or for consideration that is vitally open to suspicion of self-dealing on the part of management. The contract was not cancelled. The sale may have been cancelled, but insofar as the liquidated damages retained by Mr. Wygod is concerned, the contract was fully performed and I am advised by my attorney that it was the execution of this contract on August 7, 1970, at a time when Blair & Co., was insolvent and unable to meet its debts, that constitutes the fraudulent conveyance and not necessarily the performance or nonperformance of one particular aspect of the contract.

Although I am advised that the assertion has been made that the liquidator has elected to, or been directed to bring an action against Mr. Wygod to recover the $100,000., or its equivalent, I respectfully submit to this Court that this sum of money can only be recovered through the medium of an adjudication in Bankruptcy, because Mr. Wygod has not breached his contract and Mr. Scorese can have no greater right to recover the $100,000., than Blair & Co., Inc., itself, and I am advised by my attorney that as he understands the facts set forth herein, he very seriously

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doubts that either Blair & Co., Inc., or Mr. Scorese, the liquidator, can possibly recover that sum.

The facts set forth above are documented and indisputable. There is nothing in Mr. Saks' affidavit that contravenes any of these facts. I sincerely doubt whether the Alleged Bankrupt can come forward with any affidavit by anybody else disputing or contravening any of these facts. I respectfully feel that as a matter of law, this Court must hold this transaction to be a fraudulent conveyance and in consequence thereof, should adjudicate by granting my cross-motion for summary judgment.

I now address myself to the contention that the appointment of a liquidator by the New York Stock Exchange does not constitute an act of bankruptcy.

I have no right to discuss the law involved and respectfully do not do so, leaving this to my attorney.

I do respectfully, however, take issue with the contention in support of the motion for summary judgment that Mr. Scorese was appointed as a liquidator only for the purpose of assisting public customers of Blair. This is a fine, altruistic purpose, with which I do not disagree. But a scrutiny of the agreement of September 21, 1970, submitted in support of the motion for summary judgment as Exhibit 3 (a copy of which I had never been able to obtain before) reveals the true nature of the liquidator's position.

The contract authorizes and consents to the appointment of a liquidator in paragraph VI. (P. 8) stating:

> "... the Exchange shall have the right to appoint such person as it may choose as *Liquidator of the business of the Corporation.*" (Emphasis ours)

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In paragraph VIII. (P. 10), the contract states:

> ". . . the Liquidator shall take control of the business and property of the Corporation *for the purpose of liquidating the business of the Corporation.* . . ." (Emphasis ours)

including, among other powers:

> "ii.) he shall have power to retain independent public accountants, consultants, counsel and other agents and assistants and shall have power to augment and reduce or eliminate the staff of the Corporation;
>
> v.) he shall take such other steps as he deems necessary or appropriate *to liquidate the business of the Corporation.*" (Emphasis ours)

Continuing as a statement of policy:

> "It is agreed that consistent with the duty of the Liquidator *to effect a fair and orderly liquidation of the business of the Corporation* to enable prompt settlement with its customers, the Liquidator shall act in accordance with what *he deems* to be good business practice." (Emphasis ours)

I do not go into detail as to the rights and powers of the liquidator, so carefully and completely set forth in the power of attorney annexed to the contract between Blair & Co., Inc., and the New York Stock Exchange because this document is before the Court as an exhibit, except to state

to this Court that in all of the years in my experience, I have never seen a more powerful and more complete and dictatorial assignment of power to any person under any other circumstances. The liquidator is an absolute and complete dictator, responsible to nobody, in accordance with the statement of policy quoted above that he was to act in accordance with what *he deems* to be good business practice.

Throughout this document, he is given absolute control of the liquidation of Blair & Co., Inc., all within his discretion. He can decimate or augment the staff; he can pay consultants, a dangerous power open to great abuse, accountants, attorneys or anybody else that he, in his sole discretion, may decide is needed. He can collect, reject, compromise, litigate, dispose of, abandon any asset of Blair & Co., Inc., without being answerable to anybody. I am advised by my attorney that no Receiver or Trustee appointed by any Court could possibly be granted the unlimited and unbridled power that this contract and power of attorney awards to this liquidator. Neither my attorney nor I could think of a possible element or power that a Receiver or Trustee appointed by a Court could possibly have that this liquidator does not have without responsibility for its exercise.

Interestingly enough, the liquidator has the absolute right to pay my claim. The Court may note that the contract binds directors and voting stockholders of Blair as participants, and I am neither a director or a voting stockholder. As a matter of fact, I am advised by my attorney that I am actually a customer within the definition of §60 e. of the

Bankruptcy Act, which includes in its definition of a customer,

> "persons who have claims on account of securities received, acquired, or held by the stockbroker from or for the account of such persons . . . (f) by way of loans of securities by such persons to the stockbroker . . .".

The contract and power of attorney permit the liquidator to

> "pay any claims against the Corporation considered by him to be a valid claim of any customer of the Corporation;" (Par. VIII iv. P. 11)

The only limitation to the liquidator's right to pay customers relates to any debts due to participants, that is to say, directors and voting stockholders of the corporation, which does not include me. The contract prohibits any payment to any subordinated lender or debenture holder who is a participant until any money advanced by the Trustees of the Stock Exchange is repaid, (Par. II. Pp. 2-4) but I am not included in that prohibition. Thus, in the absence of a Bankruptcy proceeding, my rights as a creditor of Blair are completely at the mercy of this liquidator with dictatorial powers, who alone has the right to determine whether my claim is valid and to what extent, as to which determination no standards have been set and from which determination there is no appeal.

As far as any layman is concerned, and in the eyes of the general public, a liquidator with the powers enumerated

above is a Receiver. As stated above, he has more powers than a Receiver, more power than any officer of the corporation, and less responsibility. To argue or hold that a person with greater powers than a Receiver who is appointed by contract, instead of by a Court order, is less than a Receiver would be to fly into the face of reality. To all intents and purposes, the concepts of a liquidator and a Receiver are the same, and the difference only one of semantics. I respectfully feel that the appointment of this liquidator with these powers and under these circumstances constitutes an act of bankruptcy.

I now address myself to the ridiculous contention raised by the pleadings and the affidavit in support of a motion for summary judgment to the effect that I and my co-petitioners are de facto shareholders of Blair, and that we are not creditors. The ridiculousness of this assertion is truly a question of law, but I take the liberty of submitting certain basic and unalterable facts in opposition to this contention.

I am and have been an investor in securities for many years, as the Court may note from the schedule of securities that I pledged in support of the collateral note. I hold a Bachelor of Arts degree from Indiana University (1931), M. A. Columbia University (1933) and a Ph.D. Columbia University (1935). Mr. Ramsey and Mr. Vanderbilt, and all of the other officials of Blair & Co., Inc., with whom I dealt are all educated, literate people with many years of experience in dealing with securities. We all knew and we all know today the difference between a stock and a bond. If I had wanted to buy stock in Blair & Co., Inc., I would

have bought it. If I wanted to buy preferred stock in Blair & Co., Inc., these gentlemen would probably, very happily have sold it to me. After mature discussion and investigation into the affairs of Blair, during the course of which I was shown financial statements, which will be the subject of other litigation, etc., in our full maturity and with knowledge of what we were doing, elected to enter into a collateral note agreement, which is before this Court as an exhibit in support of the motion for summary judgment, (Exhibit 3) and which was unquestionably drawn by competent attorneys.

To come before this Court and argue that that which is plainly set forth in carefully drawn documents by skilled attorneys is actually something else, is an offense to the intelligence of this Court, to say nothing of the parties involved in this transaction. I need only respectfully refer the Court to the collateral agreement itself, which states:

> "IX. *Right to Receive Subordinated Debenture.* The Corporation will issue and the undersigned will accept with respect to any payment . . . of all or part of the Indebtedness, a Subordinated Debenture in substantially the form of Annex II hereto, *evidencing the indebtedness of the Corporation* in a principal amount equal to such payment of all or part of the indebtedness. (Emphasis ours)
>
> * * * * *
>
> . . . until the issuance to him of such Subordinated Debenture, the undersigned shall have the rights of a subordinated lender on the terms set forth in Annex II."

Affidavit of John P. Foley, Jr., in Opposition to Motion and in Support of Cross-Motion

Turning to Annex II, we find a document, which by its terms cannot possibly be construed to be nothing other than a debenture note, which is an obligation by its terms, which states that:

> "Blair & Co., Inc., a Delaware corporation (the "Corporation"), for value received, hereby promises to pay to the sum of $, and to pay interest etc., etc."

In the face of this documentation, the contention that I and my co-petitioners are not creditors is so absurd that it requires no further comment on my part.

In preparing and executing this affidavit in opposition to this motion for summary judgment brought on by the Alleged Bankrupt, and in support of my contention that petitioners are entitled as a matter of law to an immediate adjudication, I have attempted to answer the specific contentions raised in the affidavit of A. George Saks on the specific points raised therein. I respectfully feel that I have shown this Court, firstly, that I and my co-petitioners are bona fide creditors entitled to the rights of such in executing and filing the Involuntary Petition in Bankruptcy, that at least three distinct acts of bankruptcy have been committed, and that while there may be some disputed facts on the question of the first act of bankruptcy, there truly cannot be any dispute as to the second and fifth acts of bankruptcy, most particularly the appointment of the liquidator, and by reason of these facts, the Alleged Bankrupt's motion must be denied and summary judgment granted, adjudicating Blair & Co., Inc., a Bankrupt.

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WHEREFORE, deponent respectfully prays this Court for an order denying the motion of the Alleged Bankrupt, and granting summary judgment to petitioner adjudicating Blair & Co., Inc., a Bankrupt, and for such other and further relief as to the Court may seem just and proper in the premises.

JOHN P. FOLEY, JR.

[Jurat omitted in printing.]

ASSETS

CURRENT ASSETS

Cash	$ 7,896,7
Clearing and Other Deposits	543,4
Securities Borrowed	1,204,5
Fail to Deliver	10,029,0
Other Broker Receivables	1,208,7
Receivable from Customers:	
Margin	28,282,9
Other	14,621,8
Securities Held for Firm -	
At Market	4,341,8
Secured Demand Notes -	
At Market	5,985,1
Dividends Receivable	2,564,8
Other	1,340,9
TOTAL CURRENT ASSETS	78,020,2

OTHER ASSETS

Exchange Memberships - at Market	658,7
Furniture, Fixtures & Improvements - Net	2,441,8
Investment in Affiliates	463,9
Deferred Charges & Prepaid Expenses	409,7
Miscellaneous	296,4
TOTAL ASSETS	$ 82,290,9

EXHIBIT I ANNEXED TO AFFIDAVIT OF
JOHN P. FOLEY, JR.

BALANCE SHEET
JUNE 30, 1970

ASSETS		LIABILITIES & CAPITAL		
	$ 7,896,778.71	CURRENT LIABILITIES		
r Deposits	543,480.00	Bank Loans		$ 38,915,000.00
ed	1,204,500.00	Securities Loaned		3,103,700.00
	10,029,072.27	Fail to Receive		5,572,702.77
ivables	1,208,762.28	Other Broker Payables		1,237,835.78
ustomers:		Payable to Customers:		
	28,282,978.73	Free Credit Balances		10,368,444.76
	14,621,832.27	Other		7,802,710.25
		Firm Securities Sold but not		
or Firm -		Yet Purchased		697,234.91
Market	4,341,876.77	Unclaimed Dividends		2,019,296.71
tes -		Other Accrued Expenses and		
Market	5,985,160.00	Accounts Payable		2,522,812.58
ble	2,564,815.48			
	1,340,947.23	TOTAL CURRENT LIABILITIES		72,259,737.78
RENT ASSETS	78,020,203.74	CAPITAL AND SUBORDINATED BORROWINGS		
		Subordinated borrowings		
		Debentures	13,937,819.00	
ips - at Market	658,750.00	Secured Demand Notes	6,320,128.00	20,257,947.00
es & Improvements - Net	2,441,864.00			
iliates	463,999.33	Capital Stock and Surplus (Deficit)		(10,226,704.03)
& Prepaid Expenses	409,726.50			
	296,437.18	Total		10,031,242.97
ETS	$ 82,290,980.75	TOTAL LIABILITIES & CAPITAL		$ 82,290,980.75

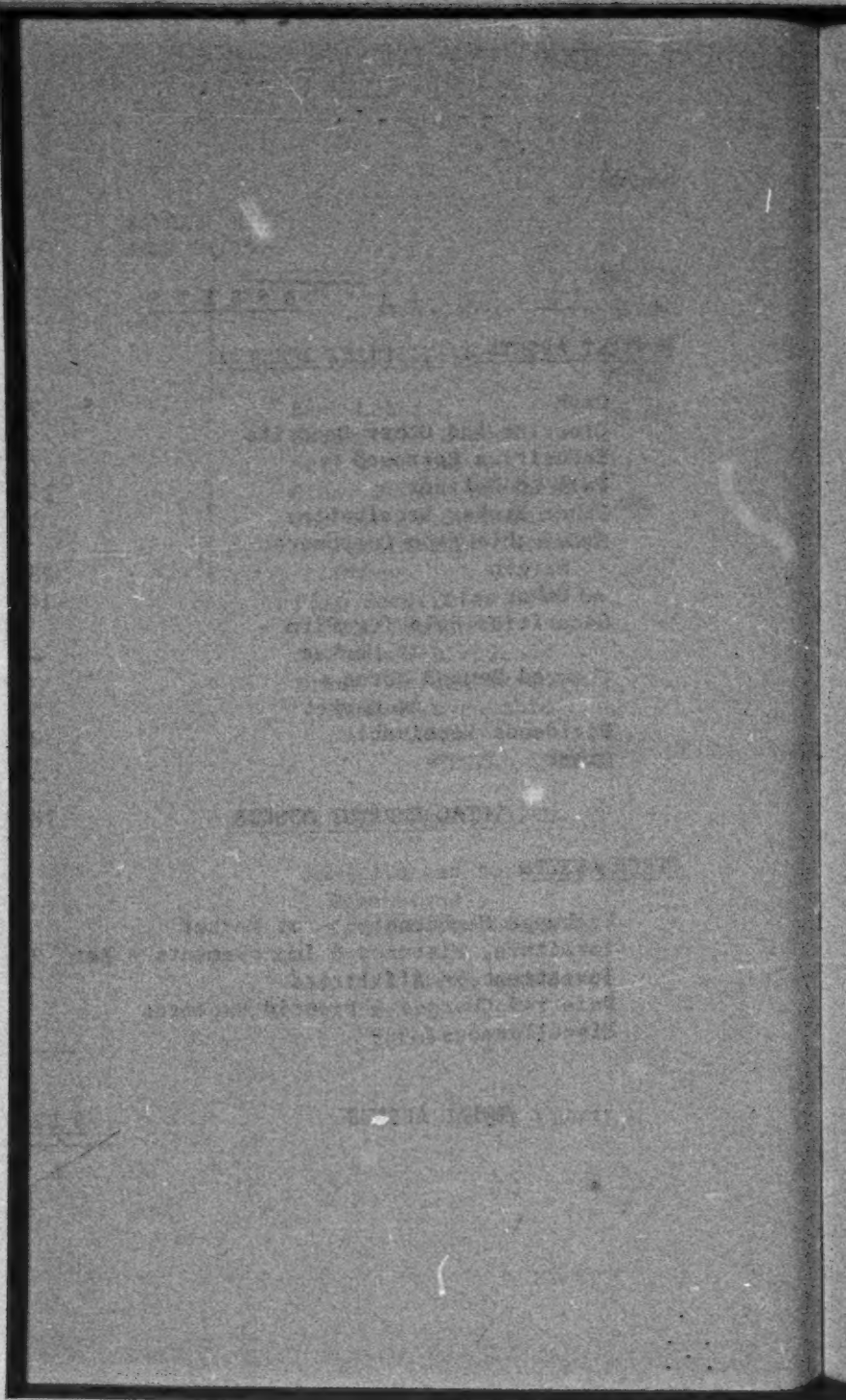

EXHIBIT II ANNEXED TO AFFIDAVIT OF JOHN P. FOLEY, JR.

Investment Advisory Contract

On August 7, 1970, Blair entered into an agreement ("Agreement") with Mr. Martin J. Wygod to sell to Mr. Wygod all the outstanding stock in the Adviser for $25,000. Blair owns all the outstanding voting stock of the Adviser consisting of 1,000 shares of Common Stock, par value $1.00 per share. The Adviser is also authorized to issue 900 shares of Class A nonvoting stock, par value $1.00 per share, but no such stock has been issued. On June 29, 1970, Blair acquired from Mr. Thomas R. McNeil 140 shares (approximately 14%) of the Adviser's outstanding voting stock for $53,567. Mr. McNeil was at the time of such sale and is presently the President and a Director of the Fund and of the Adviser, and an officer, director and voting stockholder of Blair. On March 10, 1970, Mr. Fred W. Lange sold all his voting stock in the Adviser consisting of 140 shares (approximately 14%) to Blair for $50,000. Mr. Lange was at the time of that sale an officer and Director of the Fund and the Adviser and was an officer, director and voting stockholder of Blair; he is no longer affiliated with the Fund, the Adviser, or Blair.

The transfer of stock in the Adviser by Blair to Mr. Wygod will constitute an assignment of the present Investment Advisory Contract between the Fund and the Adviser, and will result in a termination of that Contract and of the relationship pursuant to which the Fund receives investment advice on a regular basis from the Blair organization. Under the Agreement, the approval of a new Investment Advisory Contract by vote of a majority of the outstanding

voting securities of the Fund is a condition precedent to the transfer of that stock to Mr. Wygod. The closing of the sale is to be on the business day next following the day the Fund's stockholders approve the new investment advisory contract, but in no case later than October 8, 1970. In connection with the Agreement and at the request of Blair, on August 7, 1970, Mr. Wygod made a loan to an unaffiliated party of securities in the amount of $1,500,000 toward the purchase of certain facilities of Blair (see "Distribution Agreement"). As part of the Agreement, Blair has deposited $100,000 in escrow with Mr. Wygod. Those funds may be invested in general obligations of the United States maturing within 90 days from the date of investment or in other investments to which Blair may agree. If the sale of the Adviser's voting stock to Mr. Wygod is not completed on or before October 8, 1970 (unless the time is extended due to the death of Mr. Wygod), Mr. Wygod, unless he is in default in the performance of his obligations under the Agreement, will retain all such funds and securities, without incurring any further obligation to Blair. If the sale to Mr. Wygod is completed, the $100,000 deposited in escrow plus all interest derived therefrom will be returned to Blair. Further, if the sale is not consummated on or before October 8, 1970, for a reason other than default by Mr. Wygod in the performance of his obligations under the Agreement, and if on or before December 31, 1970, Blair enters into an agreement to sell the Adviser's stock to a person other than Mr. Wygod for consideration greater than $25,000. Blair has agreed to pay Mr. Wygod an amount equal to the excess of the amount received by Blair in the sale over the sum of $25,000 plus the funds and securities

retained by Mr. Wygod. As part of the Agreement, Blair recommended to the Fund's Directors that a Special Meeting of Stockholders be called to consider and approve the new Investment Advisory Contract and to elect a new Board of Directors of the Fund.

At a meeting of the Fund's Board of Directors on August 5, 1970, a majority of the Directors present approved the calling and holding of the Special Meeting and the submission to the Fund's stockholders of the new Investment Advisory Contract and the election of a new Board of Directors. Seven of the Fund's eight Directors including all the Directors affiliated with Blair, were present at that meeting. Of the four Directors not affiliated with Blair who were present at the meeting, two voted in favor of the resolution and two voted against the resolution. The fifth Director of the Fund not affiliated with Blair, who was not present at the meeting, has advised the Fund in writing that, had he been present at the meeting, he would have voted in favor of the resolution.

The Adviser is a Delaware corporation incorporated on November 3, 1966, and may act as investment adviser for any person, firm or corporation. To date, the Adviser has rendered services only to the Fund and in connection therewith has provided investment advice and assistance, including statistical information and information respecting important developments affecting the Fund's portfolio. Mr. Wygod may at some future time offer the services of the Adviser to another investment company or companies or attempt to acquire other investment advisers, but at the present time there are no such offers outstanding nor any negotiations aimed at such an acquisition.

Exhibit II to Affidavit of John P. Foley, Jr.

The Investment Advisory Contract presently in effect between the Fund and the Adviser was entered into on March 29, 1967. The proposed Investment Advisory Contract contains substantially the same terms and provisions as the present Contract. Pursuant to the Investment Company Act of 1940, both the present and proposed Contracts must be specifically approved annually by a majority of the Board of Directors of the Fund, including a majority of the Directors who are not parties to the Contract being approved or affiliated persons of any such party (otherwise than as Directors of the Fund), or by a vote of the holders of a majority (as defined in the Investment Company Act) of the Fund's outstanding voting securities. Continuation of the present Investment Advisory Contract was last approved by vote of the holders of a majority of the Fund's outstanding voting securities on April 2, 1968 and by a majority of the Fund's Directors, including a majority of the Directors not affiliated with any party to the contract (otherwise than as Directors of the Fund), on March 31, 1970. As in the present Contract with the Adviser, the proposed Contract is terminable without penalty by either party upon sixty days' written notice, and it terminates automatically upon assignment by the Adviser.

By the terms of the present and proposed Contract, the Adviser pays all compensation of the Fund's President and chief executive officer.

If the change in the Investment Advisory Contract is effected, the Adviser will continue to furnish the Fund investment advice and assistance, including statistical information respecting important developments affecting the Fund's portfolio. Under the present Contract, the Adviser

has available without cost certain of the employees, facilities and services of Blair (see "Distribution Agreement" below) for statistical and financial analysis, corporate reports and information regarding economic and market factors and trends, upon which the Adviser may base it investment recommendations to the Fund. Blair may, therefore, be deemed an investment adviser to the Fund, although only the Adviser is responsible for recommendations regarding securities transactions rendered to the Fund. Blair will cease to supply investment advice on a regular basis to the Fund upon termination of the present Investment Advisory Contract.

For the services rendered by the Adviser, the Fund has agreed to pay a quarterly fee of 3/16 of 1% (3/4 of 1% on an annual basis) of the value of its average net assets up to $5,000,000 and 1/8 of 1% (1/2 of 1% on an annual basis) of the value of the Fund's average net assets over $5,000,000. The value of the average net assets of the Fund will be computed on the basis of the average of net asset values of the Fund at the close of business on each business day throughout the quarter. When and if the value of the Fund's net assets exceeds $100,000,000, the fee will be reduced to a quarterly fee of 1/8 of 1% (1/2 of 1% on an annual basis) on all the Fund's net assets. During the year ended December 31, 1969, the Fund incurred a fee of $71,431 to the Adviser.

Until completion of the transfer of ownership of the Adviser's outstanding stock from Blair to Mr. Wygod, the Adviser will continue to act as investment adviser to the Fund under the present Investment Advisory Contract. It is anticipated that the name Blair and reference thereto

eventually will be removed from the Fund's name, but no specific proposal or requirement to make such a change exists at this time.

A copy of the present Investment Advisory Contract is annexed hereto as Exhibit A. Matters included therein which have been deleted in the proposed Investment Advisory Contract are indicated by italics. A copy of the proposed Investment Advisory Contract is annexed hereto as Exhibit B. Matters contained therein which are not included in the present Contract are indicated by italics.

ELECTION OF DIRECTORS

The present officers and Directors of the Fund are: Mr. Oliver DeG. Vanderbilt, Chairman of the Board; Mr. Thomas R. McNeil, President and a Director; Mr. John D. Couturie, Director; Mr. Melville A. Ireland, Director; Mr. James C. Sargent, Director; Mr. John H. K. Shannahan, Director; Mr. Melvin M. Swig, Director; Mr. James B. Ramsey, Jr., Vice President; Mr. Bernard S. Bodo, Secretary and Treasurer. Mr. Harry L. Wolfson resigned as a Director on August 11, 1970.

It is anticipated that the Fund's present directors and officers, other than Mr. Bernard S. Bodo, will not serve the Fund or the Adviser in any capacity following the transfer of the Adviser's stock to Mr. Wygod. If the transfer is approved, therefore, and in connection therewith, a new Board of Directors of the Fund will be elected. A board of six Directors is to be elected. It is intended that proxies will be voted in favor of the election as Directors of the persons named in the table below, none of whom is presently a Director, to hold office until the next annual meeting of the Fund's

stockholders and/or until their successors are chosen and have qualified. If any of the named persons is unable to serve, which is not presently contemplated, the proxies will vote for another person or persons in their best judgment.

The following table includes information as to the principal occupations during the past five years of each nominee and the number of shares of Common Stock of the Fund beneficially owned, directly or indirectly, by the nominees and members of their immediate families on August 21, 1970, all as reported by the nominee to the Fund:

Name	*Address and Principal Occupation*	*Shares of Common Stock Beneficially Owned*
Martin J. Wygod	(100 Wall Street, New York, N. Y.) Since September, 1969, a director and officer of NGC Capital Management Corporation, a wholly-owned subsidiary of National General Corporation engaged in the investment management field. Between December, 1966 and December, 1969, a director, officer and stockholder of Wygod, Weis, Florin, Inc., a member firm of the New York Stock Exchange engaged in investment banking and securities brokerage activities. From July, 1965 through June, 1966, a director and stockholder of First Chelsea Corp., and from June, 1966 through December, 1966, a director and stockholder of Wygod & Co., investment advisers and consultants.	None

Supplemental Affidavit in Support of Motion for Summary Judgment Dismissing Involuntary Petition in Bankruptcy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

HARVEY R. MILLER, being duly sworn, deposes and says:

1. I am a member of the law firm of Weil, Gotshal & Manges, attorneys for Patrick E. Scorese, as Liquidator appointed by the New York Stock Exchange for Blair & Co., Inc. This affidavit is submitted on behalf of the said Liquidator and the above-named alleged bankrupt as a supplementary affidavit in support of the pending motion for summary judgment dismissing the involuntary petition in bankruptcy.

2. Pursuant to Section 59b of the Bankruptcy Act, 11 U.S.C. §95:

> "[T]hree or more creditors who have provable claims *not contingent* as to liability against the person, amounting in the aggregate to $500 in excess of the value of any securities held by them, * * * may file a claim to have him adjudge a bankrupt." (Emphasis supplied.)

Supplemental Affidavit of Harvey R. Miller in Support of Motion

In accordance with the foregoing statutory language, a person whose claim is contingent cannot qualify as a petitioning creditor.

3. John P. Foley, Jr., J. P. Foley & Company, Inc. and Anita Salisbury assert to be subordinated creditors of Blair & Co., Inc. and base their claims upon money allegedly loaned to Blair for the purpose of increasing Blair's net capital under Rule 325 of the New York Stock Exchange. The alleged bankrupt herein and the Liquidator contend that the so-called petitioning creditors are in reality investors and equity participants in Blair & Co., Inc. Assuming, *arguendo*, that the petitioners can be characterized as creditors within the contemplation of Section 59b of the Act, *supra*, at best, they are the holders of contingent claims. Therefore, they cannot act as petitioning creditors within the purview of Section 59b of said Act, *supra*.

4. As set forth in the moving affidavit of A. George Saks, sworn to November 2, 1970, in support of the instant motion ("moving affidavit"), on or about April 3, 1970 petitioners, by John P. Foley, Jr., executed and delivered to Blair & Co., Inc. ("Blair") a secured collateral note (see Exhibit 5 annexed to moving affidavit) which was contributed to Blair's capital and so reflected on Blair's statement of financial condition. The said note was collateralized by allegedly marketable securities pledged and assigned to Blair by petitioners. Under the terms of the Collateral Agreement (see Exhibit 4 annexed to the moving affidavit)

Supplemental Affidavit of Harvey R. Miller in Support of Motion

Blair had the right, among others, to liquidate the collateral in the event the said note was not paid upon presentment and demand as provided therein.

5. There is and has been no dispute during the course of this proceeding, as stated at the hearing before the court held on November 9, 1970, that the petitioners herein are subordinated to the claims of all general creditors of Blair including, of course, customers of Blair.

6. At this juncture it cannot be stated that petitioners will or have suffered any loss by reason of their contributions to Blair's capital. Unless it is ascertained that Blair is unable to pay all of its liabilities, it will not be known whether petitioners have suffered any loss and, if so, the extent of that loss. The liquidation of Blair may result in the payment and satisfaction of all claims. Certainly it is conceivable that at least a portion of the claims of so-called subordinated lenders or investors, aggregating in excess of $22,000,000, may be satisfied in whole or in part. Consequently, irrespective of the nomenclature attributed to the claims of petitioners, their claims are wholly contingent upon the results of the liquidation of Blair. In point of fact, petitioners have no claims against Blair until it is established that all or a part of the capital contributed by them has been utilized for the purpose of satisfying superior claims. In the event that the claims of general creditors and customers and all priority claims are satisfied and there are sufficient assets remaining to satisfy the claims of subordinated investors, the petitioners will have no claims against Blair.

Supplemental Affidavit of Harvey R. Miller in Support of Motion

7. It is submitted that irrespective of the characterization given to the claims of petitioners for the return of their capital, and giving the benefit of any doubt to petitioners, without conceding the validity of their assertions, such claims may be denominated as contingent liabilities of Blair.

8. It is further submitted that the claims of petitioners cannot be readily determined or estimated without unduly delaying the decision of this court upon the issues raised by the involuntary petition in bankruptcy and the answer thereto. Resultantly, the petitioners do not possess the attributes necessary to qualify as creditors capable of filing a petition in bankruptcy against Blair.

WHEREFORE, it is respectfully prayed that the motion for summary judgment be granted in all respects and that an order be entered dismissing the involuntary petition herein.

HARVEY R. MILLER

[Jurat omitted in printing.]

Transcript of Hearing Before Hon. Herbert Loewenthal, Referee in Bankruptcy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

(In Bankruptcy)

No. 70 B 755

[CAPTION OMITTED]

United States Court House
Foley Square, New York, N. Y.

November 10, 1970
10:00 A.M.

Before:

HON. HERBERT LOEWENTHAL

Referee

MOTION TO DISMISS PETITION

ADJOURNED MOTION RE: DEPOSITIONS

ADJOURNED MOTION RE: AMENDED PETITION IN BANKRUPTCY

Appearances:

MESSRS. WEIL, GOTSHAL & MANGES
Attorneys for the Liquidator
767 Fifth Avenue
New York, N. Y.

By: HARVEY R. MILLER, Esq., and
CHARLES SELIGSON, Esq., of Counsel

Motion for Summary Judgment Dismissing Involuntary Bankruptcy Petition

ALEX L. ROSEN, Esq.,
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20 Broad Street
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By: DANIEL T. ZAELLER, Esq., of Counsel

MESSRS. GALPERR, ALTUS & KARP
Attorneys for Customers
245 Park Avenue
New York, N. Y.

By: AARON KARP, Esq., of Counsel

Professor Seligson: This is a motion for summary judgment dismissing an involuntary bankruptcy petition that was filed against Blair & Company by J. P. Foley & Co., Inc., John P. Foley, Jr., and Anita Salzberg.

The involuntary petition alleges the commission of two acts of bankruptcy. One, that on or about the 10th day of August, 1970, Blair & Company, with intent to hinder, delay and defraud its creditors, transferred valuable prop-

erty consisting of a management contract called the Blair Funds, of the alleged value of $1 million.

The Referee: Is Blair Funds a corporation?

Prof. Seligson: It's an independent mutual fund.

The Referee: That is going to come up in this argument? Is it a corporation?

Prof. Seligson: Yes, your Honor, it is. In addition, it is alleged in the involuntary petition that an act of bankruptcy was committed by the appointment of Patrick Sclorise (phonetic) as the liquidator within the meaning of Section 385 of the Bankruptcy Act. Now, the motion for summary judgment is based upon the following: (1) that the—

The Referee: What was that section you just quoted?

Prof. Seligson: 385, Acts of Bankruptcy. That section reads, "Acts of bankruptcy by a person shall consist of his having while insolvent or unable to pay his debts as they mature, procured, permitted or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."

Now, we, the moving parties, take the following positions: (1) that the petitioning creditors lack the capacity to qualify and to act as petitioning creditors, because their claims were subordinated to the claims of all general creditors other than those who likewise have subordinated their claims; (2) that the first alleged act of bankruptcy did not in fact occur. There was no transfer. There was an agreement to transfer and the necessary approval by the directors of the Blair Funds was not obtained and the deal was not consummated, so there was no transfer, and (3), that the designation of Mr. Sclorise as the liqui-

dator does not come within the purview of Section 385 because he is neither a receiver nor a trustee. So no act of bankruptcy was committed.

Now, I understand that an application was made for leave to amend the involuntary petition which came on before your Honor yesterday, and I am told that the motion and application were put over until today.

Now, that application, so I am told and I have not had an opportunity to look at those papers, alleges the commission of an act of bankruptcy by the making of a preferential or alleged preferential transfer. So I should like first, if your Honor pleases, to address myself to the capacity of the petitioning creditors to be petitioning creditors, because if you will agree with our reasoning in this regard, then we need not go further. It doesn't make any difference whether they did, or whether Blair did or did not commit an act of bankruptcy.

The Referee: You are not concerned with what would happen to Blair & Company if you're successful here this morning?

Prof. Seligson: I am not only concerned, I think it would be a great benefit to the general creditors if this petition was dismissed, because what I am told is that this is a representation made by the New York Stock Exchange.

The Referee: There is no agreement?

Prof. Seligson: There is a commitment, a definite binding commitment by the New York Stock Exchange.

The Referee: What kind?

Prof. Seligson: A public commitment made publicly.

The Referee: That is in agreement with you?

Prof. Seligson: Yes, sir. They have acted upon it and if necessary we can even reduce it to writing.

The Referee: At the moment there is no writing?

Prof. Seligson: There is enough of a public commitment to hold the New York Stock Exchange to it, and under that commitment if in the course of a liquidation outside of bankruptcy there develops any kind of a deficiency for the customer creditors, the customers of the Stock Exchange will make good that deficiency to the tune of 10 or $12 million.

The Referee: There is also a threat to the Court that if there is bankruptcy, all bets are off.

Prof. Seligson: No, your Honor. It's not a threat. This was made long before the petition was filed. It had nothing to do with the filing of the petition.

The Referee: I've got that now.

Prof. Seligson: Now, if your Honor pleases, why do we take the position that these petitioners are not qualified? We say that they are in effect investors. Calling themselves creditors does not make them so, because they have expressly subordinated their position to the rights of all other general creditors.

The Referee: That is covered in your brief.

Prof. Seligson: Now, this is not the ordinary subordination where A, who is the owner of the A corporation, wants X to do business with the A corporation and the corporation owes A money. He says, if you do business with the A corporation, I will subordinate my claim to your claim. It's not that kind of a subordination at all, your Honor. This is a subordination expressly provided for under the rules of the New York Stock Exchange, which I understand are almost identical with the rules

of the Securities & Exchange Commission. In order to carry on business as a broker, the ratio between assets, capital and liabilities must be 20 to one. So when this 2½ million or the amount of the indebtedness of the petitioners here was contributed in the form of a promissory note secured by stocks, securities, it was contributed for the express purpose of making it possible for Blair to meet the capital requirements of the New York Stock Exchange. It went in with the petitioners knowing it was going to be used as capital and not just an ordinary subordination, taking it out of the category of the normal subordination, which even there the courts have held constitutes a pro tanto assignment for the benefit of the creditors for whose benefit the subordination has been made. And so we have, as I see it, your Honor, a very clear situation here where these subordinated creditors could not by analogizing them to the position of limited partners could not vote in the election of a trustee, even though there are extensive creditors.

That was limited in the Ira Haupt case. We have prepared in our memoranda showing the identity between a limited partner and a subordinated creditor in the situation like that, and I needn't take the time to go over it. I know your Honor has read the briefs, as well as the memorandums which have been submitted.

There is still another question that arises and it is linked with this question of capacity to act as petitioning creditors, and that is this: The Statute 59 which speaks of petitioning creditors, says their claims must not be contingent. Since there is a question, let me read the statute. 59(b) says: "Three or more creditors who have provable

claims not contingent as to liability . . ." The language is very plain. I think it needs no construction. The claims of the petitioning creditors need not, must not be contingent.

The Referee: That is covered in your additional affidavit?

Prof. Seligson: Now, we don't know at this time whether or not Blair & Company is insolvent. We don't know whether or not it will be necessary to use any part of subordinated capital in order to satisfy the claims of the creditors who come ahead of the subordinated creditors. Their claims, whether or not there is a liability in their favor, depend upon the results, the outcome of liquidation. There may be no claim. There may very well be no claim at this time or at the time liquidation is completed, and so their claims are not absolute and fixed at this time. They depend entirely upon the results of the liquidation.

Now, we have a situation here, your Honor, where three creditors whose claims are subordinated, made a contribution for the express purpose of providing capital and come into this court and say, "We have the right to determine whether or not there shall be a bankruptcy liquidation. We have the right to determine whether or not the assets have to be liquidated in bankruptcy rather than out of bankruptcy." And they say that in the face of the commitment of the New York Stock Exchange, which I previously adverted to.

Now, I say to you, your Honor, that if there was no subordination agreement and if they simply put their money up for the purpose of adding additional capital, although ostensibly remaining creditors, that this Court as a court

of equity would not permit them to act as petitioning creditors because, your Honor, this Court must consider not only the narrow legal questions that are presented here, but the broad outline and determine where the equities are in a situation of this sort under Section 2a. As your Honor knows, this is best exemplified in the Bank of Marin case. This court is basically a court of equity and should do equity and it would be wrong to say, let the tail wag the dog, and that is what is being done here or the attempt is being made to have that done here.

Now, if as they say, and I just noticed, I quickly ran over their affidavit and memorandum this morning, if they say that Blair & Company is insolvent, they are saying to you, we know that we will not collect anything from this estate, and yet notwithstanding that we want to force a liquidation—and that is the position they are taking without saying so. Their argument is that this company is insolvent. We don't concede that there is insolvency because we don't know. They say this company was insolvent on June 30. Sure, they weren't able to satisfy the capital requirement of the New York Stock Exchange and the Securities & Exchange Commission, but that didn't make them insolvent for the purposes of determining whether this is a capital deficiency or violation of the capital requirements rule, where certain assets are excluded. But if you take the balance sheet of June 30, 1970 and you just take the current liabilities against the current assets, you will find that there are current assets of $78 million against current liabilities of $72 million, so that there is no insolvency yet that we know of. It may develop that there is an insolvency, in which case, then, it will be necessary to invade

the secured subordinated claims. Until we know what the outcome of the liquidation is, we just don't know whether or not we are dealing with an insolvent company and if we are, then certainly under the circumstances here these petitioning creditors have no right to force this company into a bankruptcy liquidation.

Now, it is true that some of the collateral that was put up by these petitioners has been converted into cash, but that doesn't mean that when the liquidation is completed there is any money left over after paying all creditors they won't get it back. They will be paid in full. We don't know what is going to happen there.

Now, if we turn to the Acts of Bankruptcy, the first one, it just doesn't happen. There was no transfer. It is plain in the affidavit that was submitted to you that there was no transfer of the rights in the Blair Fund, and, two, as to whether or not the liquidator is a receiver or trustee within the meaning of 385 of the Act, it is plain from the history of 2A21 of 69D and of 3A that an agent, and that is what a liquidator comes down to, he is an agent for the corporation. He is not a receiver or trustee within the contemplation of that statute.

Now, why? Section 2A 21 was added in 1938, and that, as your Honor knows, requires receivers or trustees or agents appointed for the purpose of liquidation to make an accounting to the Bankruptcy Court. That takes care of the situation that occurs before bankruptcy.

Section 69D deals with the situation after bankruptcy. If there is an agent who has been appointed to liquidate and the Bankruptcy Court permits him to stay in possession and to continue to operate the debtor's business, the alleged

bankrupt's business after bankruptcy, then it requires that he get permission from the Bankruptcy Court to do the things that have to be done, which is precisely what has been done here so far.

Section 3A5 itself was amended in 1938 and was not broadened to include an agent. It remained receiver or trustee. So it is quite clear that Congress, having all three sections in contemplation at the time that the '38 Act was passed, the Chandler Act, it was a deliberate act on the part of Congress to exclude the agent or liquidator in the Act of Bankruptcy.

Now, there is good reason for that. Congress had in mind someone who was judicially appointed, a receiver or trustee or who under a statute became a constructive trustee, such as the case Judge Weinfeld decided, the case of the liquidation of a corporation.

The Referee: That is cited?

Prof. Seligson: There is a statute that provides that the directors become trustees when a certificate is filed. So you have some protection there under a statute surrounding that sort of liquidation, but Congress did not intend that an agent who is appointed by a debtor to whom no title was transferred and whose agency could be terminated under certain conditions, as is the case here, should be deemed appointed as an act of bankruptcy. Had Congress intended to do that, it is clear when they amended this very clause 3A5 and incorporated the provision of equity in insolvency and the appointment of a receiver or trustee while insolvent or unable to pay its debts as they mature, that is what was added there, your Honor, Congress would have added the word agent appointed to liqui-

date if it had intended that that should be an act of bankruptcy. They added it in 2A 21 and they added it in 69D. They didn't add it here. That is not what Congress intended to constitute an act of bankruptcy.

I think, your Honor, that I have within the time allotted to me covered the grounds that I wanted to cover and tried to make clear the points on which we rely.

The Referee: I have got your point.

Mr. Rains: I want to say this preliminarily, Mr. Referee. I was served with an affidavit, the supplemental affidavit in support of this motion for summary judgment, which raised another argument which I am going to try to meet on this oral argument, but I may—I would like to have an opportunity to submit an affidavit to counter some of the facts that are inferred in this supplemental affidavit. I was just served this morning.

Let me say this, getting right down to the nub and to the pivotal problem argued by Professor Seligson. In essence, he argued that as the statute stands the Federal Government, which is supposed to have exclusive jurisdiction over the liquidation of insolvency, he states by the laws of this country, has the right to set aside a liquidation under state law. It has the right to set aside a liquidation under the SEC. It has the right to set aside the liquidation in an equity receivership, but it has no right to set aside the liquidation under the sacrosanctity of the holy New York Stock Exchange. That is what he says here and that is the focal point of this argument and this is the pivotal issue in this case. We filed this petition in bankruptcy because we felt that we were entitled under the Constitution of the United States and under the laws and the decided

cases to have the liquidation of an insolvent company conducted under the control of the Bankruptcy Court, because the Bankruptcy Courts have exclusive jurisdiction and have said so again and again. Judge Weinfeld said it very clearly in the Bonnie Classics case, with which I am sure you are familiar; and this argument that comes up here that says that we creditors must stand by and let the—

The Referee: You said Bonnie Classics was Judge Weinfeld's case?

Mr. Rains: Yes, sir. Southern District of New York, Judge Weinfeld's decision in which he says, I quote it in my brief, "Were the position contended for by the alleged bankrupt to be upheld—that is their contention—it would at once be the effective means of defeating the exclusive jurisdiction of the Bankruptcy Court." He goes on very interestingly. "It would enable directors whose administration brought the corporation to its insolvent plight to take charge of the corporation, its assets and their distribution to the exclusion of creditors and deny the latter the right to select their own trustee."

If your Honor pleases, this concern was under the control of the New York Stock Exchange for better than a year. They were in financial trouble.

The Referee: Why don't you get an injunction against the New York Stock Exchange?

Mr. Rains: We don't want one. We are not seeking an injunction.

The Referee: You are talking now about New York Stock Exchange running this Blair & Company.

Mr. Rains: They are running this liquidation. They were in control under these rules of their member companies

and yet, we will show in a bankruptcy proceeding the millions of dollars that management pulled out of this business while they got strangers like my clients sucked into it. I think creditors have a right to take that position. I don't expect a representative of the New York Stock Exchange to uncover all of these acts. This is the province of a trustee in bankruptcy.

Now, I have listened very carefully to Professor Seligson's argument and I have read the affidavit in support and the memorandum in support of this motion. I think that the argument that my clients, the petitioning creditors are not creditors of Blair & Company is so far out that I am completely surprised that it is even raised here. Every document which is marked before you is part of these motion papers drawn by very skillful attorneys, making a record of a transaction between sophisticated experienced people, investors. Mr. Foley is a Ph.D., as I set forth in the affidavit. Mr. Ramsey and Mr. Vanderbilt are people who know what they are doing. If Dr. Foley wants to buy stock in Blair & Company they would gladly have sold it to him. If he wanted to be a preferred stockholder, they would have sold it to him. These people entered into a long 11-page contract and every word in that contract says "creditor." Every document refers to a debenture. A debenture, I have set forth legal definitions of what a debenture is, what a certificate of stock is. How could we appear before a court of law and say that when a document specifically by its own language says, if we use your stock we will give you a debenture and the debenture says Blair & Company agrees to pay, how anybody can say that which is said in the document is wrong, but that because of other facets of law, because of other trade practices, they take

the debenture holders and put them up in a section of a balance sheet which is in accounting practice that converts a creditor into a stockholder or into an equity holder. The comparison between the subordinated lender and a limited partner is fantastically ridiculous. A limited partner couldn't sue his limited partnership to get his money back. A subordinated lender, when his debenture comes due, has a right to go to court and has a right to get his money back. Why, even Professor Seligson's argument in which he says we don't know whether they are creditors or not until we liquidate Blair, is facetious. Let us assume that Blair & Company liquidated by some miracle and everybody knows it is not going to happen. By some miracle, even let us assume they had enough assets to pay out all of their customers. At that point my client would still be a creditor. He would still be entitled to get his money back. He wouldn't have to go into the Delaware courts to bring on an action. He would have a right in New York State to bring an action in the Supreme Court to get his money back. This is the right of a creditor.

Now, I can't say with all of the argument that Professor Seligson has advanced that the fact is that the only cases that were ever decided on this subject hold very clearly that a debenture holder is a creditor. In this morning's New York Times I read that your Honor had signed an order of adjudication last week in First Devonshire, and one of the petitioning creditors there was a subordinated lender. Nobody raised this issue before.

The Referee: They didn't raise the question.

Mr. Rains: I understand that. The point is that the very phrase itself—

The Referee: Where did you read this?

Mr. Rains: New York Times. The fact is, the phrase itself, a lender subordinated he may be, but he is still a lender. A subordinated debenture holder. Subordinated he may be, but he is still a debenture holder and he is a creditor. When you look at their financial statement that is before your Honor, it specifically says capital stock in one line and it says subordinated lenders on another line. They are not the same.

Now, the fact that the SEC and the Stock Exchange pass their own special rules which give stock brokers a special privilege of borrowing money or borrowing securities for the sake of bolstering up their capital structure, this is a question of morality. This is a question in which some men differ. I personally think it is all wrong, but that's got nothing to do with this case. The fact is the Stock Exchange said that in arriving at your 20 to one ratio you have a right to include not only capital stock, but you have a right to include any subordinated debenture holders to make up that 20 to one. That doesn't convert a fixed obligation of a debenture holder to be repaid his money into a capital structure. I leave that question.

I say to your Honor that your Honor must upon considering this case grant summary judgment to the petitioning creditors and must adjudicate this. There is no question of fact involved in the appointment of the liquidator. He is a liquidator. He was appointed. The contract appointing him is an exhibit before your Honor. His power of attorney is before your Honor. There is no question of fact to be determined on a trial.

I ask your Honor upon consideration of the cases, upon consideration of the law to hold as a matter of law that the fifth act of bankruptcy has taken place. There is no question of letters insolvency. I don't think they wasted any time on it. I don't want to waste your time on it. The June 30th statement shows that the capital structure of this company was wiped out June 30th. The only reason they have anything under the line of the creditors, the subordinated lenders so that they are insolvent. Everybody recognizes that they are insolvent: the newspapers, the Stock Exchange. Professor Seligson, an honorable man, can't in good conscience say to your Honor that they are solvent—now, they are insolvent and a liquidator has been appointed. The very fact that Congress repealed the section in 1954 which said that only a liquidator appointed by a State constituted an act of bankruptcy is a clear indication that that limitation was removed and again without belaboring the fact of the cases set forth in my brief, which I have set forth substantially, including Judge Weinfeld's decision, it is clear that the appointment of any liquidator, the appointment of a liquidator, whether by contract, by court or by state law, or whether by federal law, constitutes the appointment of a trustee or a receiver.

One case, your Honor, in which I have shown the difference between a receiver and a trustee is—

The Referee: Don't tell me that. The trustee has title. Go to something else.

Mr. Rains: Colliers on Bankruptcy makes it very clear that the appointment of a liquidating agent is an act of bankruptcy.

The Referee: Tell me more.

Mr. Rains: All of which I have cited on page 3-2 of my memorandum. I will skip the first part. I have cited this Smith case which you read. I have cited the Bonnie Classics case.

The Referee: I read your view of the Smith case.

Mr. Rains: I didn't discuss the Smith case. It stands for itself. It clearly holds the private person constitutes such a liquidator. I asked you to hold as a matter of law that the appointment of this liquidator constitutes an act of bankruptcy and that there should be an adjudication and I will repeat again, because it comes into this category, what I said at the opening of my remarks to the Court and that is that the point of view presented by the moving party here is audacious, because it says that when a private liquidator is appointed by a private institution like the New York Stock Exchange that the liquidator can be removed and bankruptcy instituted in its place.

The Referee: I can remove that liquidator?

Mr. Rains: You can remove him by adjudicating him bankrupt. You can remove him, but by adjudication—they say the New York Stock Exchange has a greater right to liquidate this company than does the Federal Court and I say that is wrong.

The Referee: I have got your point.

Mr. Rosen: I might say, your Honor, I have been so busy that I have refused to handle this portion of the case, but I did advise counsel, however, when he asked me to act as of counsel that to me there appear to be only two key questions here. One Professor Seligson had raised, an argument that a subordinated creditor has no standing. Simple as all that. He goes into an argument about a contract and

states that under the contract he becomes a capital investor. In other words, he becomes, his money is treated as if it is part of the capital. That is rather ridiculous, your Honor. Nothing has been presented to this Court that can show that where a person has put himself under the status of being a subordinated creditor if other creditors are paid he is entitled to share. Apparently Professor Seligson is mixed up with the provisions of the taxing authorities in the Treasury Department which provide in certain instances—

The Referee: I will hold now that Professor Seligson is not mixed up.

Mr. Rosen: He is mixed up on that score. This is not a case involving taxes where the Government comes in and says this is a capital investment, rather than a loan. This is not that type of a case, your Honor. To that extent, I say he is mixed up.

Let's go to the second phase of it, your Honor. Incidentally, your Honor, this has already been decided by the courts. The question of subordinated creditors having rights in bankruptcy. It was only decided about two months ago in the Airspur case.

The Referee: Who was the judge?

Mr. Rosen: Judge Lasker. And I will tell how it was decided there. In the Airspur case there was a question as to who should have the right to vote for a trustee. Along came the banks and the banks said that these subordinated creditors have no standing. They can't vote for a trustee. They have subordinated. All the issues that have been raised by Professor Seligson were raised in the Airspur case. Your colleague, your Honor, Referee Babitt, held

that they had an absolute right to vote. They were creditors in spite of their subordination, no esteem, no capital investment, none of that. An eminent jurist, Judge Frankel, and very capable I presume, sustained. No appeal was taken. That is the law of the land. So I don't understand any argument that is subordinated creditors have no standing.

Furthermore, I might respectfully refer to Professor Seligson's Colliers. He said he wrote the book. I think your Honor will find that his subordinated creditors are referred to and that they do have standing in his Colliers.

Let's go to the second phase, your Honor. Let's go to the phase of a question whether a liquidator who is appointed is an act of bankruptcy. I think Professor Selgison standing insofar as raising the question of status goes to a case over in Brooklyn, which involved a plan of arrangement. In that case, Referee Rudin held that where there is a plan of arrangement and where the proof is, that in the event the liquidation, the subordinated creditors couldn't receive one penny. In that case, the plan of arrangement did not have to include subordinated creditors and they had nothing to vote on the plan of arrangement. Here Professor Seligson says we are not insolvent. That is a sort of paradox. We are not insolvent. Is he saying that the subordinated creditors are going to be paid? I don't think he means that. I don't think he can even say that.

Now, let's go to the other crux of the case, your Honor. The other crux of the case is that the Stock Exchange is appointed a liquidator in coordination with the bankrupt or the alleged bankrupt. Now, the Stock Exchange is interested only in paying preferred creditors under Section

60E of the Bankruptcy Act. If there is anybody who has no standing here, it is the Stock Exchange and its liquidator, because they represent preferred creditors. Under Section 60E of the Bankruptcy Act the Stock Exchange is not liquidating for the benefit of general creditors. They are only interested in customers. Customers that should get paid and customers who are supposed to get paid have certain rights, preferences and priority under Section 60E of the Bankruptcy Act, who in liquidation represent the general creditor party. Talk about standing!

Now, your Honor well stated, where is any agreement by the stock exchange that they will even pay the customers.

The Referee: I think they can back out any minute.

Mr. Rosen: If there was a written agreement and it was submitted to the Court, your Court would say as a court of equity, the Court might say to himself as a court of equity, Well, for heaven's sakes, isn't it good for the general public? At least the customers could get paid. I might agree, maybe it's better to swing this way.

Here, your Honor, there is no such agreement. This is merely commentary by Professor Seligson whom I respect.

The Referee: They could be held. They have acted on it.

Mr. Rosen: That is contrary to what the Stock Exchange says. There is no such thing as making a public commitment and being held. There is not written agreement, no absolute commitment. I merely say to your Honor very simply, as far as standing that has been decided by this Court in this District in my case, the Airspur case, decided by Judge Frankel. That is the law. The matter went up on review.

Now, insofar as—

The Referee: I think before you said Judge Lasker.

Mr. Rosen: I'm sorry, Judge. I may be wrong. Lasker is on my mind on the International Oil cases. Your Honor, that is the law and with due deference to Professor Seligson, there is no question of standing here; none.

The other issue I say is a very serious issue, your Honor. Has a liquidator been appointed? The Stock Exchange is only interested in the main and preferred customers under 60E.

The Referee: At the time I permitted that to go along with Pat Scorese on behalf of the Exchange, I thought it was in the best interests.

Mr. Rosen: No, your Honor, for two reasons: One, they're only interested in customers and the Bankruptcy Act is interested in all creditors. Number two, there is no written commitment.

The Referee: Should we stop it?

Mr. Rosen: I certainly think you should, your Honor, because the general creditors body is not protected.

The Referee: I would only consider that on written papers.

Professor Seligson: First, I want to say this: The Collier paragraph that Mr. Rains referred to on page 3-3, on the top of the page, certainly does not give any comfort to Mr. Rains. Let me tell you something to go beyond that, your Honor. Collier is generally regarded as the Bible, and properly so, but Collier now and then makes mistakes too. I didn't write that section of Collier. I reminded just the Referees on Saturday who were assembled here for the Eastern Regional Conference and the seminar, they pointed to Collier as authority for a construction of 64A, you know, the 1966 amendment, your Honor, but the courts that have

decided the amendments didn't agree with Collier. Four of them, four courts in four different jurisdictions decided that Collier was wrong, so I don't think we can take Collier for all purposes unless it's supported by cases, and there is only one case on this—

The Referee: You wrote Collier's?

Prof. Seligson: Not that section. I do want to say this, your Honor. Mr. Rains is right, would be right if he came into this court representing three clearly qualified creditors and it was clear that an act of bankruptcy had been committed. He would be right in say that this Court should not yield.

The cases that Mr. Rosen—and Mr. Rosen evidently had been more diligent than Mr. Rains—he has come up with this case of his own. That is the Airspur case.

There is also the Alda case, which was decided by Referee Babitt and affirmed on the District Court. Your Honor, none of those cases involves the kind of subordination we have here.

The Referee: Did that go to the Circuit Court?

Prof. Seligson: District Court. None of these cases involved a brokerage subordination. We have got a completely different animal and that's the point I want to make. Just one other thing and that is this: Mr. Rains made some comment along the line about how the Stock Exchange in some way got his client into this situation. I said the management of Blair & Company pulled their subordinated debentures out while they were bringing people like my client in.

Mr. Rains: I should like for your Honor to read this letter. You have a copy there of April 3 that was signed by his client when the money came up, was put up.

Prof. Seligson: I neglected to comment on this. The petitioning creditor attempted to withdraw its collateral.

The Referee: I don't blame them.

Prof. Seligson: He started an action in the New York State Supreme Court. The action went to arbitration. He lost in the arbitration. He held he was not entitled to withdraw.

Mr. Rains: You're wrong, Professor Seligson. The arbitration concerned itself only with whether we could stop them from selling our securities, because there was a claim of fraud in the inducement.

Mr. Zaeller: They did decide they could not withdraw.

Prof. Seligson: I will be glad to—

Mr. Rosen: That was the Alda Commercial Corporation case.

Prof. Seligson: I will let the record speak for itself, your Honor. That is all I have to say.

Mr. Rains: As I said, there was one issue that was raised, to the effect that Foley is supposed to be a contingent creditor. That was not raised in the original moving papers and I think I need to complete the record and have the right to submit an affidavit, very brief, to the effect that his securities were sold with the exception of two blocks of stock, so that there was no longer a contingent as to liabilities at the time this petition was filed. I ask your Honor's permission to supplement with a brief affidavit by Thursday to that effect.

Mr. Rosen: A subordinated creditor is not a contingent creditor.

The Referee: I am going to render a decision now, because of the importance of this matter which is very in-

volved, complicated and many millions of dollars involved. Neither side, nobody has mentioned the important fact that there has been a demand for a jury trial here as to the issues of insolvency. That was raised by Blair & Company. That creates a serious question of whether a Referee in Bankruptcy has jurisdiction over the matter while this is pending. In other words, I believe that the United States District Judge to whom this jury trial will be sent should be the man to try this issue. There is a very serious question now, whether or not I should dismiss your petition so you can take an immediate review or I can respectfully refer this entire matter to the United States Judge who is going to try this issue in the very near future.

Now, I will give you a short—

Prof. Seligson: Your Honor, in view of the position you are taking, in which you question whether you have jurisdiction, I would respectfully suggest you refer it to the United States District Judge.

The Referee: That is what I am going to do. This matter is respectfully referred to the Judge who is to try this jury issue of solvency and he will have the whole matter before him.

I want to thank you all. You have been very courteous. Nobody has been insulted. The book Mr. Seligson wrote, he left out that particular section.

Mr. Rains: May I inquire for a moment whether you are merely referring this motion to the District Judge or whether your decision means—

The Referee: Everything goes up to the Judge. Now, if the Judge should later on refer anything to me as a special matter, that is another thing. That gives me jurisdiction. Thank you very much.

Transcript of Hearing Before Hon. Asa S. Herzog, Referee in Bankruptcy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

[CAPTION OMITTED]

United States Court House
Foley Square, New York, N. Y.

March 11, 1971— 2:10 P.M.

Before:

HON. ASA S. HERZOG,

Referee.

ADJOURNED HEARING ON MOTION FOR SUMMARY JUDGMENT

Appearances:

Messrs. WEIL, GOTSHAL & MANGES
Attorneys for Liquidator
767 Fifth Avenue
New York, New York

By: CHARLES SELIGSON, Esq.,
HARVEY R. MILLER, Esq., of Counsel

Motion and Cross-Motion for Summary Judgment, Motions to Amend Petition, and Permission to Conduct a 21a Examination

LEO H. RAINES, Esq.
Attorney for Petitioning Creditors
521 Fifth Avenue
New York, New York
—and—
PATRICK A. LYONS, Esq.

MESSRS. MUDGE, ROSE, GUTHERIE & ALEXANDER
Attorneys for Alleged Bankrupt
20 Broad Street
New York, New York

By: DONALD ZOELLER, Esq.,
GERARD DUFUIS, Esq., of Counsel

ALSO PRESENT:

PATRICK E. SOCRESE
Liquidator

The Referee: Do I understand that there is a motion and a cross-motion?

Mr. Miller: There is a cross-motion, your Honor.

The Referee: Strangely I have the Notice of Motion for Summary Judgment dismissing the involuntary, but I do not have the cross-motion.

Mr. Miller: I believe it may have been an oral motion.

Mr. Raines: There was no formal notice of cross-motion. But in the answering affidavit, in my prayer for relief I cross-moved.

The Referee: I haven't even got that.

Mr. Raines: Do you have any answering affidavit?

The Referee: No. That was not among the papers that were delivered to me. Have you got a copy of it?

Mr. Raines: I hope that my copy is complete. I will try to run down the rest of the papers.

I am afraid that my office copy does not have affixed to it all of the exhibits. May I impose on one of my opponents to whom I served a complete set of papers.

Mr. Zoeller: Will you take a look, Mr. Raines, and see if that is a complete affidavit with the exhibits you have annexed thereto.

The Referee: Very well.

Mr. Seligson: If your Honor pleases, I appear here in support of the motion to dismiss the involuntary bankruptcy petition that was filed against Blair & Company on or about the 29th day of September, 1970.

The facts are set forth in our memorandum which I understand has been submitted to your Honor. I hope you have it. No?

The Referee: I haven't got that either.

Mr. Raines: If I may complete this, if your Honor pleases, there are actually four motions. There is a motion for summary judgment brought on by the liquidator. There is a cross-motion for summary judgment urged by the petitioning creditors. There is a motion for leave to amend the petition by inserting an amount of money and there is another motion for permission of this Court to conduct a 21a examination. Now, all of these motions were before Referee Loewenthal and all were referred back to the District Court.

The Referee: I am familiar with that.

Mr. Raines: Yes.

Now, I gather from what your Honor says that all you have is the motion for summary judgment.

The Referee: I have the motion for summary judgment. Now I have a copy of Mr. Foley's affidavit. I have a copy of the record before Judge Sugarman. I have got the order sending it to me and that's all that was given to me.

Mr. Raines: May I respectfully urge, if your Honor pleases, that our argument before you would rather be incomplete unless we get all the papers.

The Referee: Why? I can hear you without the papers.

Mr. Raines: If you will hear us, but then give us an opportunity to search because there are briefs on both sides.

The Referee: Yes. I want briefs. I certainly am not going to come to any conclusions today.

Mr. Raines: They are already on file. The point is we have to run them down.

The Referee: All you have to do is get them for me. No problem.

Mr. Raines: So long as we understand.

Mr. Seligson: If your Honor pleases, Blair & Company was a stock broker and in or about the 21st day of September, 1970, because of financial difficulties in which it became involved, it entered into an agreement with the New York Stock Exchange under which a liquidator, Mr. Socrese, was appointed, and on the 25th day of September, 1970, the trustees of the special trust fund of the New York Stock Exchange made a loan to Blair & Company, and in accordance with the agreement and the understanding that Mr. Socrese would act as the liquidator and assist the public customers of Blair as long as there was any indebtedness due to the special fund.

Now, following that Mr. Socrese entered upon the performance of his duties, and on or about the 29th day of September this involuntary bankruptcy petition was filed. Now, the involuntary bankruptcy petition was filed by J. P. Foley & Company, John P. Foley, Jr., Anita Salsbury.

The acts of bankruptcy which are alleged in the involuntary petition are, No. 1, that "on or about the 10th day of August, 1970, with intent to hinder, delay and defraud its creditors the alleged bankrupt did transfer to persons unknown—whose names are unknown to petitioner valuable property consisting of a management contract of the Blair Fund of the value of $1 million."

And then there is the additional allegation that an act of bankruptcy was committed by the—another act of bankruptcy was committed in that the bankrupt while insolvent or unable to pay its debts since they matured procured, permitted or suffered, voluntarily or involuntarily, the appointment of Patrick E. Socrese—well, they say "Scorse" but it's Mr. Socrese—liquidator as receiver or liquidator of the assets of the alleged bankrupt and said receiver or trustee—"trustee" seems to be X'd out here—was put in charge of the property of the alleged bankrupt on or about the 28th day of September, 1970.

The Referee: They claim to come under acts 2 and 5. The receiver is 5, isn't it?

Mr. Raines: The receiver is 5.

Mr. Seligson: The fifth act of bankruptcy, yes, of course, your Honor. Two and five.

Now, then on the cross motion that was made by counsel, I understand that it is contended that—a separate motion that was made. That's one of the motions you refer to.

Mr. Raines: It wasn't a cross-motion. That was separately made. I made two motions and you made one and I cross-moved.

Mr. Seligson: I see.

It's claimed that another act of bankruptcy was committed that while insolvent—am I correct, Mr. Raines?—while insolvent that the bankrupt did transfer properties of the value of blank dollars to various creditors, in the language of the statute, no names, no amounts stated therein, but I am told that that's the basis for a motion made to amend.

Mr. Raines: To insert an amount.

The Referee: Just to insert an amount?

Mr. Raines: Just to insert the amount.

The Referee: Insert an amount where?

Mr. Seligson: In paragraph B on page 2 evidently of the—

Mr. Raines: The stenographer inadvertently left an amount out. At the time I dictated I didn't know.

The Referee: In which act of bankruptcy?

Mr. Raines: That's in the second act.

Mr. Seligson: Second act of bankruptcy, the preferential transfer.

The Referee: In other words, he alleged three acts of bankruptcy.

Mr. Raines: That's right, that's what he claims now. That's the basis of his motion, your Honor.

The Referee: In other words, what they left in there was the printed matter and they didn't fill in the blank.

Mr. Seligson: That's right.

Mr. Raines: That's right. We crossed out certain things which we weren't alleging. This was not crossed out and the amount was inadvertently left out.

Mr. Seligson: While counsel has the burden on that, I can see at this point it's claimed that this is one of three acts of bankruptcy. That completely fails to satisfy the requirements of the statute. It's just as if a new petition is being filed with a new act of bankruptcy being alleged, and our Court of Appeals has said that an allegation of the commission of an act of bankruptcy in the language of the statute, without more, certainly does not apprise the alleged bankrupt of the charge which has been levelled against it.

The Referee: They also have said that they can amend it.

Mr. Seligson: Yes. But it speaks as of the date of the amendment.

The Referee: Oh, yes.

Mr. Raines: Oh, no, with all due respect, Professor—

The Referee: With all due respect to you, I just wrote an opinion. You can get a copy of it. It was just published. It will not relate back in this form. If you think you are going to pull in the four-month period on the basis of what you have in this, you are quite mistaken. Not with me, you won't and you may look at that opinion. It's the last opinion I did. It's available to you. It deals directly with the relation back theory on just this point. The name of the case is Nan Jay.

Mr. Seligson: There is, as I recall, your Honor, a Court of Appeals decision squarely in point.

The Referee: Right on the nose.

Mr. Seligson: I recall that. I didn't really come prepared to argue it, but since the question came up—

The Referee: They can allege it, but if it's not within the four-month period you will have to move to dismiss it on the grounds it doesn't allege an act of bankruptcy. In other words, I am saying it's amendable.

Mr. Seligson: Yes, I agree.

The Referee: But relation back, no.

Mr. Seligson: I completely agree. I don't have any problem with that.

The Referee: Let's go ahead then.

Mr. Seligson: Now, your Honor, the first act of bankruptcy, I might say, was under 2a(1). That's the so-called fraudulent transfer. And I think we can dispose of that very quickly.

The affidavit that we have submitted shows that the debtor did not own any management contracts, No. 1; and, No. 2, the management contract which is referred to never was transferred.

The Referee: It was a contract whereby they intended to, but they never did.

Mr. Seligson: But not the bankrupt. Even another corporation.

The Referee: Blair advisory or Blair something of that nature?

Mr. Seligson: That's right.

So that it's like the cases, your Honor, where a contract is made for a bulk sale and before the time for passing of title the bankruptcy petition is filed on the basis of the contract; and the courts have held that that is not an act of bankruptcy because it's not a consummated transaction,

and we have had that problem on the question of amending the Act, as your Honor will recall. So that I don't think it serves any useful purpose even to get into the first act of bankruptcy because it just wasn't done; there wasn't any transfer and I think counsel will recognize that.

Now, we turn now to what are the basic questions which are involved in our motion and they are two, your Honor. No. 1, whether the petitioning creditors have the capacity to act as the petitioners in view of the fact that they are subordinated creditors. That's the No. 1 question.

The No. 2 question is whether the designation of Mr. Socrese under the contract that was made by Blair & Company with the New York Stock Exchange came within the purview of 3a(5) that the debtor while insolvent or unable to pay its debts as they matured—

The Referee: On that first point you raise, I am more interested in another angle that your papers raised. Not so much that they were subordinated but that they were akin to a limited partner.

Mr. Seligson: That's right.

The Referee: By the nature of the investment, whether it was a loan or an investment. I think that might be the core of it.

Mr. Seligson: Well, your Honor, on the question—

The Referee: I won't interrupt you any more.

Mr. Seligson: No. I wish you would because I know what is on your mind and I want to address myself to that.

There are two cases which bear upon this problem. One is the Alda Commercial case, which is a case that came up before Referee Babitt and went to Judge Mansfield—Judge Bonsal. I am sorry. Where Referee Babitt on the

facts before him ruled that the subordinated creditors could cast a vote for the election of the trustee, and he was sustained by Judge Bonsal, and the other is the case over in Brooklyn where the Referee—and I don't recall who that was—it was Rudin, I think. In any event, the Referee in the Item Lab case ruled that it wasn't necessary to get the consents of subordinated creditors because they had no interest under the arrangement and there again that court was sustained by the District Court.

The Referee: I know on one occasion I followed Item Lab on the same problem.

Mr. Seligson: I have forgotten just who the Judge was.

Mr. Raines: I think it was Referee Rudin.

Mr. Seligson: No. But the District Court.

Judge Bartels, that's right. Judge Bartels analyzed very carefully the position of the subordinated creditor and came to the conclusion that since there was no interest, they had no interest under the settlement, that it was unnecessary to have their vote, their consents. On the other hand, we had the contrary result under different facts and dealing with a different problem. Now we have a third problem.

The Referee: Can he be a petitioning creditor.

Mr. Seligson: Can he be a petitioning creditor?

Now, I might say in regard to the decision over here of Judge Bonsal that that turned on the facts in that case. There was no proof of it that this company was in fact insolvent. So that there was nothing there for the subordinated creditors. There was no proof at all on that. I was in that case representing the assignee for the benefit of creditors and that was superseded by the filing of the bankruptcy petition, and I think the simple approach that

I take to the capacity of the subordinated creditors is this: No. 1, I agree with Judge Bonsal and with Referee Babitt that there is nothing under the statute which makes any provision for subordinated creditors. It doesn't say one way or the other. And I agree that the statute says that all creditors, in effect, shall be treated alike; that is, as between themselves and in the distribution of assets unless, of course, they have security or are entitled to priority under the very language of the statute.

The Referee: Subordination will go just to distribution.

Mr. Seligson: That's right. The statute doesn't reach the problem that we have here, which is simply this: assuming just arguendo that counsel is right in his allegation that the bankrupt was insolvent at the time that Mr. Socrese was appointed, assuming for the moment that he was, then it must follow, inevitably, that the subordinated creditors have no interest whatever. They are in no different position than the subordinated creditors under a settlement where creditors are not going to be paid in full. They have no interest to protect and what I say is, No. 1, that subordinated creditors—and particularly on the type of subordination in this case, which is a subordination for the purpose of creating capital. That's the very purpose of this kind of subordination.

Under the Stock Exchange rules, which is similar to the Securities and Exchange Commission rules on the subject, by putting up a promissory note and securing it with collateral—then I think the ratio is 20 to 1—by putting up one dollar they could incur twenty dollars of debt, and this was to satisfy the capital requirements provision of the New York Stock Exchange and the SEC regulations.

This is a completely different kind of subordination from when I say to you if Mr. Miller owes me $10,000, which I wish he did right now, and if you will ship him merchandise or lend him $10,000, I will subordinate my claim against him to your claim. Now, that's a completely different kind of subordination.

Here is a subordination made for the benefit of all the public that does business with Blair & Company in order to satisfy the Stock Exchange rules and capital requirements, and I say that a man in this position—and we have attempted to draw an analogy in our memorandum—is like a limited partner and that he should not be permitted to put Blair & Company into bankruptcy at the expense of those who are senior to him or to them and that's what this comes down to.

Then I take another position. Putting all that aside, I say that this ought to be approached from the standpoint of what is equitable and what is equitable as between the parties, and I say that a senior creditor should be able to stop someone who is a junior to him under the absolute priority rule, if nothing else, from taking action which the senior creditor regards as detrimental to his interest, to wit, putting Blair & Company in bankruptcy when the New York Stock Exchange has taken the position that if there can be a liquidation out of bankruptcy, it will contribute $15 million or $16 million to make customers whole here, and I think keeping in mind what I consider the equities here as between the parties, that the Court, consistent with the doctrine announced in the Bank of Marin case as well as in hundreds of other cases holding that the court has equitable jurisdiction, ought to say that

these petitioning creditors have no right to act as such and that on that ground alone the petition should be dismissed because they do not qualify as petitioning creditors.

The Referee: Of course, if we did that, we would have to hold it in abeyance and allow other petitioning creditors to come in under 59.

Mr. Seligson: All right. Then if necessary—actually 59 doesn't apply, your Honor, to a dismissal on that basis. 59 applies where there is an application made by the debtor or creditors to have the petition dismissed. Then the notice would have to be given under 59. No. This petition, I think, is just like any motion for summary judgment, even in a stockholders' derivative case.

The Referee: Incapacity to sue.

Mr. Seligson: The capacity to sue. The case would have to go right out the door. Then if three creditors want to file a petition and there were grounds to do so, they could file another petition.

The Referee: I am much more interested in the question of this liquidator.

Mr. Seligson: Now, turning to the liquidator, which, I must confess, is a very fascinating question because the statute doesn't deal with it at all in this context, not under Section 3a—

The Referee: Wasn't there a case where a commissioner of insurance appointed a liquidator?

Mr. Seligson: There was one case in which it was argued—was it a liquidator? The liquidator was an assignee, was the equivalent of an assignee, and the court said no. But, in any event, under the fifth act of bankruptcy he would hold that's proper. This was the Smith case.

The Referee: What was he there? What was he in the Smith case? Was he not appointed under some State law?

Mr. Seligson: Under the banking law.

Mr. Raines: I think the banking commissioner appointed him.

Mr. Seligson: He was called liquidating trustee.

The Referee: He was appointed by the Commissioner of Banking. I thought so. That's a very old case. But they held that was equivalent to a receiver or trustee.

Mr. Seligson: That's right.

The Referee: But this is something different here.

Mr. Seligson: This is completely different.

The Referee: I am afraid you won't find a case on point on this.

Mr. Seligson: No, there isn't.

The Referee: Why do I always get cases of first impression.

Mr. Seligson: Actually I think you enjoy getting those cases, if I may say so.

Let me address myself to the statute now, 3a(5). The language of the statute refers to receiver or trustee, and our position is very simple. The receiver means someone appointed by a court. A trustee means someone who is created as a trustee, as we understand that term, under some statute or written instrument expressly making him trustee and charging him with responsibilities of a trustee.

Now, on the second part, of course, Judge Weinfeld was right in his case where he held that the directors of a dissolved corporation under New York law, by statute, became trustees.

The Referee: That's right.

Oral Argument

Mr. Seligson: Of course there is no question about that. I wouldn't quarrel with that at all, and a receiver clearly means a receiver appointed by some court. Who else can appoint a receiver? It has to be some court.

The Referee: They clearly had one purpose, to take charge of the property and liquidate it and distribute it.

Mr. Seligson: That's right.

Now, if we turn to the statute—I am not going to bore you with the historical development of the 1890 Act, changed in 1903 and then changed in 1926. But what is most significant is that in 1938, when the Chandler Act was adopted, Section 2a(21) provided for an agent authorized to liquidate, that he should turn over and surrender the property if appointed within four months. Section 69 did not, 69A, dealing with the acts of assignees, non-bankruptcy receivers or trustees after bankruptcy. But thereafter, in 1952, the statute was amended to include agents in 69 but agents were not included in Section 3a(5).

Moreover, Section 3a wasn't completely overlooked because in 1952, at the same time, there were two changes made to Section 3a. So that section was analyzed and what was done obviously was what Congress intended should be done, and so that the omission to add agents authorized to liquidate business in 1952, when they were amending 69 to incorporate that very language and when they were amending Section 3a in two other particulars shows that this was a conscious act on the part of Congress, that they didn't want the designation of an agent who didn't get title. They did not want him, his appointment, to be regarded as an act of bankruptcy.

Now, it could very well be that it's just one of those things, an oversight that Congress should have done, perhaps Congress should have done. I am not arguing that. I say Congress didn't do it, it didn't intend to do it. It was conscious of what it was doing, and we have to reach that conclusion in the light of the other amendments that were made at the same time.

So I say, your Honor, that there is no provision in the statute, in Section 3, which makes the appointment of an agent an act of bankruptcy, and it doesn't make any difference whether they are solvent or insolvent.

If you examine even the agreement under which he was appointed, you will find that under certain circumstances that agency can be terminated.

The Referee: Just what was the function? I glanced through that agreement, but it's sort of complicated, since it is not really my area, the Stock Exchange area.

Mr. Seligson: It's not my area.

The Referee: You represent them.

Mr. Seligson: I represent them and I have read the agreement.

The Referee: What actually is the function under the agreement of this liquidator? What is his position legally? He doesn't get title.

Mr. Seligson: No, he doesn't get title. He acts in the name of the corporation.

The Referee: And does what for them?

Mr. Seligson: For example, he delivers out securities, he collects the balances that are due against securities where payment has not been made in full. Where payment has been made in full and they can identify the securities,

he delivers them out. In other words, he does what the company would have done in winding up.

The Referee: It's what the company was doing.

Mr. Seligson: And was doing at the time, that's right.

The Referee: Now, is that appointment a condition precedent to the several million dollar loan by the Stock Exchange?

Mr. Seligson: Oh, yes.

The Referee: I want to know. In other words, is he their watchdog? They will lend that money, but they want their man in there watching it?

Mr. Seligson: That's right.

The Referee: I am asking. I am not saying.

Mr. Seligson: If you are going to extend credit to represent a committee and the debtor is going to continue in business, you let the debtor continue in business but you say, "We want our accountant to countersign the checks. We want to see the money goes in the right ways" and that's, in effect, just what Mr. Socrese has been doing. They have been carrying out their business and he's been watching it and seeing that the moneys that the Stock Exchange advanced—and they advanced money on September 25, the first loan was made. You see, they didn't have some securities. They had to go out and buy the securities in order to deliver securities.

The Referee: How much did they advance?

Mr. Seligson: How much is advanced so far?

Mr. Miller: The liquidator cannot be appointed until there is an advance, and there was an initial advance of just $1,000 to trigger his appointment.

The Referee: I see.

How much was advanced thereafter?

Mr. Miller: Since the bankruptcy, your Honor, no funds have been advanced.

Mr. Seligson: Since the bankruptcy, of course, we have been waiting.

The Referee: That happened only four days afterward.

Mr. Miller: Yes.

The Referee: I get it.

Mr. Seligson: But the Stock Exchange is prepared as I understand, and I am told, to advance from $15.9 million.

The Referee: Will that make everybody whole?

Mr. Seligson: It will make every customer whole.

The Referee: I mean that.

Mr. Seligson: Yes, it will.

If there are any other liabilities, someone has to come in and take care of those liabilities.

The Referee: All right.

Mr. Seligson: This is what will happen if the petition is dismissed and Mr. Socrese is reinstated as the liquidator under the agreement.

Now, Mr. Socrese has been continued, your Honor, under an order of Judge Wyatt.

The Referee: As what?

Mr. Seligson: Well, I don't know as what he is.

The Referee: He wasn't appointed as receiver.

Mr. Seligson: He wasn't continued. He just denied the motion for receiver.

The Referee: He permitted him to continue to act.

Mr. Seligson: He permitted him to continue to act and he has been acting ever since.

Oral Argument

The Referee: Put it this way: he didn't restrain him from continuing to act.

Mr. Seligson: Oh, no.

We applied for the order under 69b it is.

Mr. Raines: D.

Mr. Seligson: 69d, yes, your Honor, which says he is acountable to the bankruptcy court. Whatever he has done has been done under an order of the court, so call him what you will, he is not a receiver, and Judge Wyatt didn't think there should be a receiver in this case. For example, here's an order of November 12, 1970, the order authorizing the liquidator to transfer and deliver customers' accounts and to take other action. Here it is. You can see how he has been functioning since.

The Referee: Very well.

Mr. Seligson: If you don't have our—

The Referee: Don't worry about it.

Mr. Seligson: We will give you ours.

The Referee: You will get it to me. You will check the records.

Mr. Seligson: In effect, your Honor, that's our case.

The Referee: All right. How about that 21a examination order?

Mr. Seligson: That, I understand, was to be deferred until the disposition of this.

The Referee: If I dismiss the petition, there will be nothing. If I don't dismiss the petition, what do they want a 21a for, to prepare for trial?

Mr. Seligson: Evidently that's the reason.

The Referee: 21a is not authorized for that purpose. They have to get a 26 proceeding under the Federal Rules.

Mr. Seligson: That's right, your Honor.

The Referee: We will defer any discussion of that.

You have got co-counsel here. There are two parties that made the motion. Do you want to be heard?

Mr. Zoeller: No.

The Referee: You just subscribe to everything that was said?

Mr. Zoeller: I am entirely content with what the Professor has stated.

Mr. Raines: I must remind your Honor that we are here on a motion for summary judgment.

The Referee: I don't have to be reminded of that. I am quite aware of it.

Mr. Raines: All right.

Professor Seligson's recital of the facts doesn't quite accord with the documentary facts in the record before you.

As far as their motion for summary judgment is concerned their position that this liquidator appointed by the Stock Exchange is some sort of a never-never person is completely unsubstantiated by the language of the contract. This liquidator was appointed with powers that no receiver appointed by a court ever had. I have never in my experience encountered a situation where a receiver or a trustee appointed by any court had as much power and was given as much authority as this liquidator.

Paragraph 8 of the agreement says very simply, without looking for convoluted interpretations:

> "Immediately following his appointment by the Exchange the liquidator shall take control of the business and property of the corporation for the purpose of

liquidating the business of the corporation and shall proceed as follows in connection with the liquidation."

Simple English, incapable of misinterpretation, and it gives five specific purposes in furtherance of that purpose.

If the interpretation argued by Professor Seligson were to be accepted in this court, you would, in effect, be saying that the purpose of the Bankruptcy Act itself, the essence of it, which is to dispel and set aside any proceeding for the liquidation of a debtor that does not permit creditors to control its liquidation—the purpose of the Bankruptcy Act is to permit creditors to control liquidation.

Here an outside company—and I use the word "company" very broadly—an association, New York Stock Exchange, sets itself up as having a power greater than the Bankruptcy Court. It says this concern must be liquidated. This is clear by the language. The fact that when it says so it's presumed that the concern is solvent is besides the point.

The Stock Exchange and Blair & Company agreed that they were to be liquidated and despite the plain intent of centuries of the Bankruptcy Act and its intention, they take the position in this court that the Stock Exchange has a right to designate the liquidator, the person who is to liquidate this company, and I say that's directly contrary to everything I have ever known about the Bankruptcy Act.

The Bankruptcy Act permits the superseding of a State Court insolvency proceeding. It permits the superseding of a banking liquidator appointed by a banking commissioner. It permits the superseding of a liquidation by the very directors of the corporation themselves. I defy Pro-

fessor Seligson or anybody to come across a single situation where this Court or any other court has held that any agency, any company, any mode of liquidation of a company take priority before liquidation under the Bankruptcy Act.

The Referee: How about the bankrupt itself liquidating?

Mr. Raines: The bankrupt never liquidates itself. All it can do is file a petition.

The Referee: Supposing it was liquidating as it was here.

Mr. Raines: If your Honor pleases, if a corporation calls a meeting of its board of directors and says "We designate John Jones, our president, to liquidate this corporation—"

The Referee: That comes within the scope of that case, I know. But supposing they don't designate anybody; they just proceed to liquidate and to go out of business.

Mr. Raines: Then it would be necessary for me to prove that they are insolvent.

For instance, if a corporation running a retail store decides to run a public sale, a liquidation sale, they sometimes to run a liquidation sale, I respectfully feel that the moment they publish the liquidation sale designating an auctioneer to run a public auction, if they are insolvent I have an act of bankruptcy under 3a(5).

The Referee: You mean this auctioneer is a liquidator?

Mr. Raines: Of course he is a liquidator. You will see in the ad in the paper: "Liquidated with the consent of the owner."

The point I am making is that the very essence and very purpose of the Bankruptcy Act is that at the whim and at the desire and under the control of the creditors nobody

shall liquidate an insolvent company except under the Bankruptcy Act and that includes the New York Stock Exchange. It is to fly in the face of reality to even discuss the question of this firm being insolvent. They are unquestionably insolvent. If they are not insolvent, then all of Wall Street and everybody involved in this case doesn't know what he's talking about because they wouldn't liquidate a concern like Blair & Company if they weren't insolvent.

As a matter of fact, your Honor can take judicial notice, I am certain, from the papers that there are certain concerns in Wall Street who were thought to be insolvent who were saved.

The Referee: Certainly on a motion for summary judgment I would hold there is enough of an issue here to justify a trial as far as insolvency is concerned. That, I think, Professor Seligson will agree with me on.

Mr. Seligson: Yes, Judge.

The Referee: As far as insolvency there is no question. That's not the problem, I say. That's not the problem.

Mr. Raines: It's a problem in support of my position because the facts and the documents that I have submitted to you—and I rest on my documents, not on my version of the facts—

The Referee: I am saying there is enough of an issue on insolvency here to sustain—

Mr. Raines: There isn't. There isn't an issue on insolvency.

Let me go back to the first question of whether these petitioning creditors—

The Referee: You mean I can decide on this motion that it is or is not insolvent?

Mr. Raines: Yes, sir.

Let me just elucidate a moment on what I personally think is one of the worst elements of our financial structure on Wall Street.

Nowhere but in a stock brokerage house, in my experience, have I ever seen a situation where a company can list non-existent assets as capital of a company. I ask your Honor when you study the papers here to read—and this is documentary, it isn't a question of argument—the agreement between the petitioning creditors and Blair & Company. It is a fantastic concept.

Your Honor and I know, and everybody knows, what capital is. A man buys a share of stock and he puts up $100.

The Referee: I am not sure everybody knows what capital is. I don't go along with that. There are some pretty close questions on what is and what is not capital.

Mr. Raines: But essentially, in its simplest forms, if a man puts $100 up for a share of stock, he owns a share of capital stock, and the corporation has a right to put on its financial statement cash, $100, capital stock $100, on a simple basic balance sheet, and when this company conducts its business and it loses the $100 and it loses $101, that corportion now must have no longer any cash on its assets side, $1 on its liabilities side and no capital, and, so, it is now insolvent.

Now, witness what they do here. They go to people like these petitioning creditors, subordinated lenders they call them, and they say to them "You give us your promissory

note in which you agree to give us a million dollars if we need it on demand. You don't put up the million dollars. You just give us a note and if we're in trouble, we can call on it."

The Referee: The note is collateralized.

Mr. Raines: Let me finish.

"To collateralize that note of a million dollars, you put up stock which you own, securities which you own. You do not transfer title. You are entitled to continue to receive the dividends on that security. You merely possess them as collateral for the million dollars for which you have given your note and the amount of collateral that you must put up must have a 30 per cent shave, that is, you must put up $1.3 million."

The Referee: So if they have to convert it in a hurry, they will get at least a million dollars for it.

Mr. Raines: That makes sense.

I mention this because it becomes a very important element in this case on another subject, and I wanted to be accurate.

Now, no money is passed. The corporation does not own the stock. It only holds it as collateral. The corporation now takes this promissory note and lists it as an asset and on the right side of the balance sheet, instead of listing it as a liability, it puts it below the line in its capital section and calls it part of its capital.

The Referee: Haven't they got a right to call upon it if they need it?

Mr. Raines: Yes, they have a right to call on it.

The Referee: To that extent it's an asset.

Mr. Raines: Yes.

The Referee: If they don't give it to them, they can use the collateral.

Mr. Raines: It has a note as an asset. My quarrel isn't with the listing of the note as an asset.

The Referee: Your quarrel is with calling it capital investment.

Mr. Raines: My quarrel is calling it a capital investment because by the same term of the agreement—and I ask your Honor to study it—these agreements have a clause that upon 90 days' written notice the subordinated lender can call his note back and get his collateral back.

Now, I will say in passing, although it's not part of this motion, that my clients' belief is that the insiders pulled their money out while they were taking the outsiders in as subordinated lenders. This is what this case is all about, if you want to talk equity.

The Referee: Of course that's not before me.

Mr. Raines: It will be before you if your Honor continues the case.

The Referee: No, I am not continuing the case. I just have these motions.

Mr. Raines: But since Professor Seligson raises this question of equity, that's what this case is all about.

Now, this is the point I want to make. No matter where the debtor or the bankrupt chose to put this on its balance sheet, the fact is that these people who executed their notes by the terms of their agreement also have a contract to the effect that if their notes are called and they fail to pay the note and their securities are foreclosed as a pledge, they are then entitled to receive debentures for their money.

Now, if your Honor please, a debenture holder is a creditor. I don't think I have to argue that.

The Referee: Not stock; debentures.

Mr. Raines: A debenture, not stock. A debenture. I don't think I need to argue that a debenture holder is a creditor.

The Referee: A fancy name for a promissory note.

Mr. Raines: All right. He's a creditor.

The Referee: He's a subordinated debenture holder.

Mr. Raines: It may be subordinated, but he is still a creditor.

Now, I say to you on this motion for summary judgment that in the financial statement of June 30, 1970, which was several months prior to September 29, when I filed the petition, the financial statement of Blair & Company showed that the entire capital stock had been wiped out and that the only things in the capital section were the subordinated debenture holders. Now, under those circumstances, if your Honor pleases, I say, as a matter of law, based upon their own figures, Blair & Company was insolvent on September 29 and your Honor can so hold on this motion for summary judgment unless your Honor should find or hold as a matter of law that these subordinated debenture holders were not creditors, and I can't possibly conceive of that being held.

These cases cited by Professor Seligson are of substantial interest. I want to comment on the one by Referee Rudin with which I am more familiar than the first one.

What that case held was that the subordinated lenders—they weren't subordinated lenders; they were subordinated debenture holders—had no right to vote on the plan be-

cause they had no interest in the plan. He did not hold in his opinion, nor do I think Judge Bartel held in his opinion, that they were not creditors.

The Referee: That's right.

Mr. Raines: He held, in effect, as you would hold in Chapter X, that they were parties of no interest; they were wiped out.

The Referee: That they were not proper parties to vote on the plan. I know the case very well and I followed it.

Mr. Raines: My clients, if your Honor please, are in exactly the opposite position. Whose money is being spent by this liquidator? My clients' money. The stockholders are wiped out. They were wiped out last June.

The Referee: How are they spending your clients' money?

Mr. Raines: The only capital in this corporation, the only alleged capital in this corporation—

The Referee: What happened here?

Mr. Raines: What happened here was that after June—

The Referee: Did they call the note?

Mr. Raines: They called all the loans.

The Referee: They called it?

Mr Raines: On September 29 my client was a debenture holder.

The Referee: They converted the collateral.

Mr. Raines: All but two blocks of stock.

The Referee: They collateralized the collateral into cash?

Mr. Raines: Mostly.

The Referee: They issued debentures?

Mr. Raines: They never issued the debentures. Equitably we are debenture holders. On September 29 we were no longer subordinated noteholders. We were people entitled to our debentures, which they didn't give us.

The Referee: September 29?

Mr. Raines: The date of the petition.

Furthermore—and I say to your Honor this is all documented in these papers—when I say that they are spending my clients' money in this liquidation, everything that the liquidator is doing here—and he's doing more than any receiver can possibly do. As an illustration: If Judge Wyatt had appointed a receiver and the receiver wanted to sell the furniture in some 30 offices of Blair & Company, he would have had to apply to the Court for an order. Not with this man.

Mr. Miller: That is not true.

The Referee: Please. That's not quite right, Mr. Miller.

Mr. Miller: I am sorry.

Mr. Raines: This liquidator, we expressly asked that he not be allowed to hire consultants. The last time we appeared before this Court I heard he just went out and hired consultants.

The point I am making is that this liquidation is proceeding apace on the funds that are generated from the subordinated lenders, not the capital of the corporation, not the capital stock. That was wiped out.

The Stock Exchange, despite everything Professor Seligson and my friend Mr. Miller says to the contrary notwithstanding—at the last hearing before Referee Loewenthal —and your Honor has the record—an attorney for the

Stock Exchange was asked a pointed question: "Is the Stock Exchange putting up the money?" And he said there is no commitment in that regard. So all this talk about the Stock Exchange is nothing but a warning finger, in effect saying "If you fellows don't behave and let us liquidate this company as we see fit with our liquidator, we are not going to play, we are taking up all of it. It's my ball." And I say to your Honor this is not the purpose, not the intent of the Bankruptcy Act.

I say to your Honor that summary judgment should be granted, giving adjudication on two grounds. I am going to disregard the other acts of bankruptcy. I can talk about it, but there is an issue of fact and I will forget about it because the fact that it wasn't consummated, this giving away of a management contract which netted this company $1.8 million a year—they gave it away for $25,000 and then, when we filed the petition, they didn't consummate the deal. But the buyer put $100,000 in his pocket as a penalty for non-performance. Now, $100,000 is the subject of a fraudulent conveyance, too. All right. I am not talking about that.

But on the two primary grounds, No. 1 my clients are creditors, bona fide creditors, absolute and complete creditors.

No. 2, the appointment of this liquidator—and I ask your Honor to study the agreements—anything I say orally doesn't mean anything.

The Referee: I intend to.

Mr. Raines: When you read the agreement, you will realize that this was a liquidation.

The Referee: I think both motions will resolve on the two points you raise.

Mr. Raines: Exactly.

The Referee: Whether these are petitioning creditors and whether that liquidator falls within Section 3a(5).

Mr. Raines: That's correct.

The Referee: I think that's the nub.

Mr. Raines: I say it's an issue of law, not an issue of fact.

The Referee: It's an issue of law which has to be decided after I determine what facts are raised.

Mr. Raines: The facts are in writing. They are all written.

Mr. Seligson: First I want to refute the statement that was made by Mr. Raines, speaking, I am afraid, from ignorance, that the liquidator has been selling property on his own. Mr. Socrese has not made a single sale, I am told, except pursuant to an order of the Court, No. 1.

No. 2, he has not hired or engaged or employed a single consultant.

The Referee: Well, Professor, I don't think whether he has or has not acted under order of this Court is important. The question is what is his authority under the agreement.

Mr. Seligson: Oh, your Honor, that's the issue here.

The Referee: That's the point.

Mr. Seligson: But statements that are inaccurate on the record I think should be corrected.

The Referee: I wouldn't pay any attention to that. What I am concerned with is what power does he have under the agreement and does that bring him within 3a(5).

Mr. Raines: That's the issue.

The Referee: That's the issue.

Mr. Seligson: I agree. Except this one point. I don't think it makes any difference what power he has got under the agreement. If he is an agent appointed to liquidate, he does not come under the statute.

The Referee: But I said whether he is a receiver or trustee within the meaning of the statute. I think the title will be meaningless. You can call him anything you want.

Mr. Raines: It's his powers that determine it.

The Referee: It's whether he is what the statute intended.

Mr. Seligson: That's right.

Your Honor, I might say this. Mr. Raines has taken a broad position here with a broad brush. He said if there is a liquidation of any kind, that's an act of bankruptcy. This is news to me.

The Referee: It's news to me, too.

Mr. Seligson: I have been trying to get the Act changed for a long time to bring out something close to his thinking, but that isn't the law today.

Now, there is nothing to stop three bona fide creditors, while this liquidation is going on with Mr. Socrese out of bankruptcy, from filing an involuntary petition, if they get a judgment. Nothing to stop them from suing Blair & Company, getting a judgment. If they made a preferential transfer, they can file an involuntary petition, use that as a ground for the commission of an act of bankruptcy, and the same is true of a fraudulent transfer.

It gets down to just precisely what you have stated, two issues: capacity to file this petition; is the liquidator—and that's what he is. Forget that he is a liquidator. Is he an agent?

The Referee: Whatever he is under this agreement is it what the statute intended by 3a(5).

Mr. Seligson: I think you're right.

The Referee: I certainly will not be guided by titles of any kind.

Mr. Seligson: I agree.

The Referee: Because I don't think that's the point.

Mr. Seligson: Except I want to make this point.

The Referee: What was Congress' intent?

Mr. Raines: In my brief I cited Collier's which Professor Seligson said he didn't write that volume.

Mr. Seligson: Don't hold that against me.

The Referee: Let me ask you a question, gentlemen. Are you sitting on the briefs that you submitted?

Mr. Raines: As far as I am concerned I have done a little more research—

The Referee: Do you want any more time?

Mr. Raines: If your Honor gets to the question of the 21a, I would like permission to submit a supplemental brief because I didn't submit a brief on the last one and since then I have had the question up.

The Referee: I won't be able to decide this for the next couple of weeks. I will decide it as fast as I can. I am going to be away the 22nd to the 26th running the Referees' Seminar in Washington. As a result of that, next week is a terrific calendar. I will have two days in Yonkers because of that, too. So the moment I get back I will devote myself to this case. I know you both want me to get to it fast. You have been held up too long.

Mr. Raines: I have cooperated in not rushing this case. I was asked by Mr. Miller, and I say it openly, that we do

not want to interfere with anything that they do getting the customers out of the case and Mr. Miller knows that I have not pushed for time in the hope that with the passage of time the liquidation of the assets, the customers will get out of the case.

The Referee: My own view is that this has lingered much too long, these motions. They should have been decided long ago.

Mr. Seligson: Just in response to your question I would like to put a supplemental memorandum in.

The Referee: Inasmuch as I can't get to it until I get back, you can both have until the 30th of March to give me any memorandums you wish and then when I get back I will get down to it. I don't mind telling you I will enjoy it.

Mr. Raines: I think you will. I found it a fascinating subject.

(Hearing closed.)

Decision on Cross Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

(Caption Omitted)

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MR. PATRICK E. SCORESE
Liquidator

Decision on Cross Motions for Summary Judgment

ASA S. HERZOG, *Referee*:

Blair & Co., Inc. ("Blair"), the bankrupt above named, is a Delaware corporation engaged in the general brokerage and commission business as a registered broker-dealer, with principal offices in New York City. It was a member of the New York Stock Exchange, American Stock Exchange, and Midwest Stock Exchange.

Prior to September 29, 1970, bankrupt was engaged in the "contraction and liquidation of its business and properties" and with the exception of a record-keeping office all of its branch offices were either closed or surrendered to other broker-dealers. The services of its registered representatives (with minor exceptions) were terminated and "efforts were undertaken" to transfer and deliver the accounts of public customers to other broker-dealers or to the customer. (Affidavit of A. George Saks, a vice-president of Blair, in support of the motion to dismiss, ¶ 6.)

On September 21, 1970, the bankrupt and its directors and voting stockholders entered into a written agreement with the New York Stock Exchange ("Exchange") whereby at their absolute discretion, the trustees of a Special Trust Fund set up by the Exchange would from time to time make loans to the bankrupt to provide direct and indirect assistance to bankrupt's customers threatened with loss of their money or securities because of bankrupt's financial condition.

Paragraph designated "VI" of said agreement provided that "from and after" the first loan or guarantee by said Trustees, or the first payment by the Trustees to any of

bankrupt's creditors, is made, the Exchange shall have the right to appoint such person as it may choose as "Liquidator of the business" of the bankrupt, such Liquidator to serve until such time as all powers of attorney executed by the corporation or voting stockholders are terminated by the Exchange.

The paragraph of the said agreement designated "VIII" provides:

> "Immediately following his appointment by the Exchange, the Liquidator shall take control of the business and property of the Corporation for the purpose of liquidating the business of the corporation and shall proceed as follows in connection with the liquidation:
>
> "i) he shall promptly take such steps as he may deem practicable to reduce the Corporation's operating expenses and to dispose of the Corporation's saleable assets;
>
> • • • • •
>
> "iii) he shall, as soon as practicable, assert and collect or settle all claims and rights of the Corporation;
>
> "iv) he shall pay any claim against the Corporation considered by him to be a valid claim of any customer of the Corporation;
>
> "v) he shall take such other steps as he deems necessary and appropriate to liquidate the business of the Corporation;
>
> "It is agreed that consistent with the duty of the Liquidator to effect a fair and orderly liquidation of

the business of the Corporation to enable prompt settlement with its customers, the Liquidator shall act in accordance with what he deems to be good business practice."

Pursuant to the aforesaid agreement and on September 25, 1970, the Exchange appointed Mr. Patrick E. Scorese as Liquidator (Saks affidavit, ¶ 7) and he entered upon his duties in accordance with the terms and provisions of said agreement. The Liquidator, Mr. Scorese, is one of the moving parties herein.

On September 29, 1970, four days after appointment of the Liquidator as aforesaid, an involuntary petition was filed against Blair by J. P. Foley & Company, Inc., John P. Foley, Jr., and Anita Salisbury. Mr. Foley is principal of J. P. Foley & Company, Inc., and apparently Anita Salisbury is Mr. Foley's secretary.

The involuntary petition alleged three acts of bankruptcy [Bankr. Act § 3a, 11 U.S.C. § 21a], as follows:

"Within four months next preceding the filing of this petition, the alleged bankrupt committed an act of bankruptcy in that the alleged bankrupt did heretofore,

"(a) on or about the 10th day of August, 1970, with intent to hinder, delay and defraud its creditors, convey, transfer, conceal, remove, or permit to be concealed or removed, or set over unto said divers persons, whose names are unknown to your petitioners, valuable property, consisting of a management contract of the Blair Fund of the value of $1,000,000.

"(b) while insolvent transfer property and various moneys amounting in the aggregate to the value or sum of $ to various creditors with intent thereby to prefer such creditors over other creditors of the same class, the names of the creditors receiving such preference being unknown to your petitioners.

* * * * *

"(f) while insolvent and unable to pay its debts as they mature, procure, permit, or suffer voluntarily or involuntarily the appointment of Patrick E. Scorese as Receiver (or Liquidator) of the assets of the alleged bankrupt and said Receiver (or Liquidator) was put in charge of the property of the alleged bankrupt on the 28th day of September 1970."

The bankrupt, Blair, interposed an answer to the involuntary petition in bankruptcy denying the material allegations thereof and made written demand for trial by jury. [Bankr. Act § 19; 11 U.S.C. § 42]

Thereafter the Liquidator, Mr. Scorese, and the bankrupt, Blair, moved, pursuant to Fed.R.Civ.P. 56, for summary judgment dismissing the involuntary petition. The petitioning creditors opposed the motion, and cross-moved for summary judgment adjudicating Blair a bankrupt.

By notice of motion dated October 30, 1970, the petitioning creditors moved to amend the second act of bankruptcy alleged in the said involuntary petition by inserting the figure $5,000,000. in the blank space appearing in the allegation of said act of bankruptcy.

Decision on Cross Motions for Summary Judgment

By notice of motion dated October 27, 1970, petitioning creditors moved for an order, pursuant to Sections 3d and 21a of the Bankruptcy Act, requiring the bankrupt to appear for deposition upon oral examination and requiring the bankrupt and the Liquidator to produce at said examination books and records relating to the issues presented by the petition and answer.*

By order of Chief Judge Sidney Sugarman, dated February 2, 1971, the aforesaid motions were referred to the undersigned for hearing and determination.

The motion for summary judgment dismissing the involuntary petition will be considered first. The moving parties argue first, that no act of bankruptcy was committed upon which an involuntary petition can be predicated, and second, that the petitioning creditors are in fact investors and not creditors, and consequently, ineligible to file the said petition.

The first act of bankruptcy charged is the transfer (with intent to hinder, delay and defraud creditors) of "valuable property" consisting of a management contract of the Blair Fund of the value of $1,000,000.

The Saks affidavit states that Blair was not a party to the management contract with Blair Fund, a publicly owned mutual fund. This contract, it is averred, is or was an asset of Blair Advisory Co., Inc., a Delaware corporation and subsidiary of the bankrupt. Furthermore, it is alleged, due to action of the Board of Directors of Blair Fund, a proposed sale of the capital stock of Blair Advisory Co., Inc. was never effected, and the latter

* In view of the disposition of the motion and cross-motion for summary judgment, this motion is rendered moot.

company remained the owner of the management contract referred to in the alleged act of bankruptcy. (Saks affidavit, §§ 12-14 inclusive.)

The foregoing is not controverted by the petitioning creditors and as a matter of fact, on the argument before me counsel for the petitioning creditors indicated no reliance upon this alleged act of bankruptcy to sustain the petition (SMP 44).

Nor did counsel lean heavily on the second act alleged. The allegation of preferential transfers is in the barest language of the statute and susceptible to a motion to strike. Indeed, the allegation is so barren of facts that it does not lend itself to amendment. It fails to name the recipients of the transfers, it does not specify the subject matter of the transfer, except that it was "property and various moneys," and it neglects to state the value or sum of the property and money transferred. There is simply nothing to amend. It is so colorless that amendment would not be an amplification, but a replacement. This is clearly distinguishable from *Glint Factors* v. *Schnapp,* 126 F.2d 207 (2d Cir. 1942) in which it was charged that transfers were made to "relatives" of a sum exceeding $2,300. An amendment would necessarily have to invoke the relation back doctrine in order to fall within the four-month period during which otherwise innocuous preferences become acts of bankruptcy. The lack of any descriptive detail to show that a particular transfer was charged or even intended, makes the relation back doctrine utterly inapplicable in this case, *Divorsky* v. *Alanjay Bias Binding Corp.,* 182 F.2d 809 (2d Cir. 1950), and therefore it would be impossible to allege as an act of bankruptcy a preferential transfer that could withstand attack.

Accordingly, the motion to amend is denied and the second act of bankruptcy alleged in the petition is found insufficient in law.

The third act of bankruptcy alleged, the appointment of the Liquidator, however, falls squarely within Bankruptcy Act § 3a(5) [11 U.S.C. § 21a(5)] and must survive bankrupt's attack.

Bankr. Act § 3a provides that acts of bankruptcy by a person shall consist of his having

> "(5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily, or involuntarily, the appointment of a receiver or trustee to take charge of his property;"

The bankrupt and Liquidator argue that the type of receiver or trustee referred to in § 3a(5) of the Act is one who is judicially appointed or is appointed in accordance with the provisions of statutory law. I am unable to agree that taking control by the Liquidator is not taking "charge" of the bankrupt's property within the meaning of § 3a(5) and I reject that argument.

> "It is not required that the transferee of property be formally 'appointed' as trustee by a ceremonial document referring to him as such. The method adopted to effect the transfer is immaterial. It is the end result that counts. Any action by one who is insolvent which effectively causes the transfer of his property to another for final liquidation purposes appoints the transferee a trustee to take 'charge of his property' under Section 3, Sub. a(5)." *In re Bonnie Classics*, 116 F.Supp. 646 (S.D.N.Y. 1953).

Decision on Cross Motions for Summary Judgment

The Liquidator, Mr. Scorese, took "control of the business and property" of the bankrupt for the express purpose of liquidating it with power to take such "steps as he deems necessary and appropriate to liquidate the business" of the bankrupt. He is empowered to "dispose of the Corporation's saleable assets." He is authorized to "collect and settle all claims" and pay what he considers valid claims of any customer of the bankrupt.

As I construe the agreement of September 21, 1970, under which Mr. Scorese was designated as Liquidator, he had exclusive possession and control of bankrupt's assets at all times after he took charge. The powers he was authorized to exercise were not less than those of a court-appointed receiver or trustee. He exercised complete dominion and his possession divested the officers and directors of Blair of possession and control of the company's assets. His duty was to proceed to liquidate and wind up the affairs of the bankrupt and to distribute its assets to those entitled thereto.

Any other view of the role of the Liquidator in this case would provide a convenient way to exclude insolvent corporations from the scope of the Bankruptcy Act through winding-up proceedings worked out privately between a broker and the Stock Exchange. Cf. *In re Watts & Sacks*, 190 U.S. 1, 27. Any other construction would defeat the objectives of the Act and abort the broad powers of the court of bankruptcy intended for the uniform administration of insolvent estates. Were I to uphold Blair's and the Liquidator's contention, it could provide an effective means to defeat the exclusive jurisdiction of the bankruptcy courts and deny creditors the right to select their own trustee to effect liquidation.

"It would provide a neat way for derelict directors to gain immunity from investigative and discovery techniques and summary procedures set up under the Act. It would deprive creditors of the comprehensive powers under the Act aimed at the expeditious recovery of assets which may have been diverted or transferred from an insolvent estate." *In re Bonnie Classics*, 116 F. Supp. 646, *supra*.

I hold that the taking of "control" by the Liquidator was an act of bankruptcy within the meaning of § 3a(5) of the Bankruptcy Act.

The second contention of the bankrupt and of the Liquidator is that the petitioning creditors are not in fact creditors and are therefore ineligible to act as petitioning creditors.

The Saks affidavit avers that on April 3, 1970, John P. Foley, Jr., acting for himself, the other petitioning creditors, and Anne A. Foley, entered into an agreement with Blair, pursuant to which each made "investments" in Blair which were "characterized as subordinated loans." (Saks affidavit §§ 34, 35)

It is the nature of this transaction which gave rise to the unique situation now presented. Foley executed a "collateral agreement" and secured note in the sum of $3,784,349, both dated April 3, 1970. The secured note was collaterized by marketable securities, pledged concurrently with the execution of the note. The general scheme of the transaction, reduced to its simplest terms, was this: if Blair's call for payment on the note was met, Blair would issue to Foley a subordinated debenture

in like amount; on the other hand, if Blair's call for payment went unheeded, Blair could liquidate the collateral [¶ XI(b) of the Collateral Agreement] and issue the subordinated debenture (¶ IX of said Agreement). This is precisely what occurred and this transaction is what gave rise to the relationship between the parties which bankrupt said made Foley an investor and which Foley says made him a creditor, albeit a subordinated creditor.

The question which presents itself is why this roundabout and rather complicated method, if an investment was intended? Or indeed, why this method of making a loan, if that was the intention of the parties?

The answer, it seems clear to me, is found in the Rules & Policies to the Stock Exchange governing the operation of member organizations, and particularly, those rules applying to capital requirements. In Rule 325 (referred to in paragraph III(b) of the Collateral Agreement), the Exchange has fixed the capital requirements of its member firms and in effect has set a minimum ratio of capital to debt. It provides that for the purpose of computing the net capital of member firms there may be included "borrowings covered by subordination agreements approved by the Exchange." (Rule 325.15) In practice, therefore, the member firm needing capital borrows money to use as part of its capital requirement under an agreement to repay with interest and a percentage of net income to compensate for the risk involved in subordinating.

The reason for the secured note is that although the member firm has need to have its capital bolstered by

the securities behind the note, it has, or may at the moment have, no need for cash. The collateral agreement, therefore, is in effect a commitment to lend money, or if it does not have the money when demand is made, to permit the securities to be converted into cash.

Rule 325.30 permits subordinated liabilities to be shown in a separate section on the liability side of its statement following current liabilities and preceding net worth or capital. It permits such liabilities to be shown, for example, as follows:

"Subordinated Liabilities and Capital:

Liabilities subordinated to claims of general creditors ..... $ .....

Capital (net worth or other acceptable title) ..... $ ....."

This practice does not mask the true liabilities of the company as will be shown when the solvency of Blair is discussed, *infra*.

In any event, Rule 325 of the Exchange explains, certainly to my satisfaction, why what was undoubtedly a loan by the petitioning creditors to Blair, became a more or less complicated and certainly out-of-the-ordinary transaction.

But what emerges from the Collateral Agreement, the secured note and the pledged securities, was a loan to Blair now evidenced by debentures and the debtor-creditor relationship.

The term "debenture" hardly needs a dictionary definition. But, according to Black's Law Dictionary (3d ed.), it consists of any instrument which either creates or agrees

to create a debt in favor of one person or corporation, or several persons or corporations, or acknowledges such a debt. Debentures are nothing more than notes representing indebtedness, not ordinarily secured. 6a *Fletcher Cyclopedia Corporations* (1968 ed.) § 3635. A debenture is simply an unsecured promissory note. *G.M.A.C.* v. *Higgins*, 161 F.2d 593 (2d Cir. 1947), *cert. denied*, 332 U.S. 810 (1947).

An examination of the subordinated debenture here shows all the characteristics and earmarks of a subordinated promissory note.

Firstly, there is the fixed interest rate: the prime rate of interest in New York City, but not less than 6% per annum, payable semi-annually on fixed dates. It is common knowledge that it is not at all unusual to have interest rates keyed to the prime rate. The provision for a contingent additional return of not more than 2% per annum if net income for such purpose is available is again not unusual, and, as hereinabove indicated, serves as a compensation for the risk of subordinating the loan to other creditors.

Secondly, there is a fixed maturity date, the holder having the right to demand payment on the principal in full (or in multiples of $1,000.) two and one half years after April, 1970, or on any date thereafter on thirty days written notice. Of course, payment may be made only if the corporation is solvent, a condition to be expected since the debenture is subordinated and subject to prior payment in full of other creditors not so subordinated.

Thirdly, there is provision for acceleration upon default in payment of principal, insolvency, commission of an act

of bankruptcy, general assignment for the benefit of creditors or appointment of a receiver for all or a substantial part of the corporation's property.

Finally, throughout the debenture and the Collateral Agreement language is used which expresses the relationship of the parties in terms of a creditor-debtor situation. The debenture does not contain convertible features and thus the question of whether or not it can be held to be an "equity security" simply does not arise in this instance. Cf. *Chemical Fund, Inc.* v. *Xerox Corp.*, 377 F.2d 107, 110 (2d Cir. 1967).

I hold as a matter of law that the petitioning creditors were not capital investors but were creditors who loaned money to Blair for which they received the subordinated debentures.

The bankrupt and the Liquidator cite, in support of their contention, cases determined by the tax court but I do find these to be inapposite. The purpose of the inquiry in the tax cases frequently differs from the purpose of the inquiry in bankruptcy. The Tax Courts are faced with situations where so-called advances are in reality contributions to capital, and therefore, not bona fide debts which may be taken as tax losses.

The bankruptcy situation is entirely different. The circumstances of loans to a company which subsequently becomes bankrupt, may result in their being *treated* as capital investments for the purpose of subordinating them to the claims of other creditors, but they are none-the-less treated as creditors entitled to participate in dividends in the event other creditors are paid in full.

But a creditor who subordinates his claim to those of other creditors does not cease to be a creditor, *Goldstein* v. *Wolfson*, 132 F.2d 624 (2d Cir. 1942), and I know of no case, nor has one been cited to me, which holds that a subordinated creditor cannot be a petitioning creditor.

In re Itemlab, Inc., 197 F.Supp. 194 (E.D.N.Y. 1961) (reversed on other grounds, 353 2d 149) cited by bankrupt does not bolster its petition, merely holding that the subordinated creditor is not entitled to vote his claim on the question of acceptance of an arrangement since it "would repose in the inferior creditor the power to use his vote to determine how the superior creditor shall collect a claim in which the inferior creditor no longer has an interest." There is obviously distinction between the issue decided in *Itemlab* and that presented in the case *sub judice*. It is one thing to say that a subordinated creditor may not vote his claim in a Chapter XI proceeding, and quite another to say that by reason of subordination of their claims creditors are disqualified from acting as petitioning creditors.

Section 59b of the Act (11 U.S.C. § 95b) says that three or more creditors holding provable claims not contingent as to liability against a person, amounting in the aggregate to $500. in excess of the value of any securities held by them, may file a petition to have him adjudged a bankrupt.

Provable claims are set forth in § 63a of the Act (11 U.S.C. § 103) which provides:

> "a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by . . . an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not . . . ."

Decision on Cross Motions for Summary Judgment

It seems perfectly clear to me that the petitioning creditors have provable claims which entitled them to file the involuntary petition in bankruptcy.

The bankrupt makes what I deem a specious argument to the effect that since it has not yet been ascertained that Blair is unable to pay all its liabilities, it cannot be stated at this juncture that petitioners have suffered any loss. It is conceivable, so the argument runs, that liquidation may result in the satisfaction of all creditors' claims, including those of the "so-called subordinated lenders." Ergo, it is concluded, the claims of the petitioning creditors are contingent and they do not qualify as petitioning creditors.

This is to fly in the face of all reality. The voluntary liquidation of Blair, the intervention of the Stock Exchange, and the making available of the Exchange's Special Trust Fund to assist in making customers whole all bespeak an insolvency which reduces the likelihood of the subordinated debenture holders realizing any significant amount of their claims to such an extent that it cannot be given any weight. Moreover, as will be indicated, *infra*, Blair was and is seriously and grossly insolvent and not by any fiction can the claims of the petitioning creditors be said to be contingent.

I conclude, therefore, that the petitioning creditors are qualified to file the involuntary petition herein within the meaning of Section 59b of the Act. I have found that an act of bankruptcy has been properly alleged within the meaning of § 3a(5) of the Act. Accordingly, the motion for summary judgment dismissing the involuntary petition is denied.

I turn now to the cross-motion for summary judgment adjudging Blair a bankrupt.

Decision on Cross Motions for Summary Judgment

The facts constituting the fifth act of bankruptcy under § 3a of the Act are not denied. Mr. Scorese was, with the consent of the bankrupt, and within the prescribed four-months period, put in charge of its property and his duties and powers are set forth in the exhibits attached to the moving papers. The only question left is whether Blair was insolvent at the time, as required by § 3a(5). I hold that it was.

Attached to the cross-motion is Exhibit I consisting of a balance sheet of Blair as of June 30, 1970, two months and twenty-one days before the appointment of the Liquidator. The accuracy of this statement is not challenged. It indicates assets of $82,290,980.75. It indicates liabilities as follows:

"TOTAL CURRENT LIABILITIES		$ 72,259,737.78
CAPITAL AND SUBORDINATED BORROWINGS		
Subordinated borrowings		
Debentures	$ 13,937,819.00	
Secured Demand Notes	6,320,128.00	
		20,257,947.00
Capital Stock and Surplus (deficit)		10,226,704.03
Total		10,031,242.97
TOTAL LIABILITIES & CAPITAL		$ 82,290,980.75"

It is instantly apparent that in accordance with Rule 325 of the Exchange, discussed *supra*, $20,257,947.00 has been set up in a separate category together with capital, which may create the illusion that Blair's assets exceed liabilities by $10,000,000.

This may be perfectly legitimate and sound accounting practice, but the Bankruptcy Court is not bound by the Rules of the Stock Exchange nor by the accounting practices it countenances.

Bankruptcy Act § 1(19) provides:

> "A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of its property, exclusive of any property which he may have conveyed, transferred, concealed, removed or permitted to be concealed or removed, shall not at a fair valuation be sufficient in amount to pay his debts;"

This clear-cut definition cannot be defeated by an accounting practice which places subordinated borrowings and secured demand notes in the same category with capital. Indeed, the financial statement itself recognises the debentures as "borrowings," albeit subordinated. Applying the bankruptcy definition it appears uncontroverted that on June 30, 1970, Blair's liabilities exceeded its assets by $10,000,000. The situation, if not worsened on September 21, 1970, when the Liquidator was appointed, and on September 29, 1970, when the involuntary petition was filed, was at the very least, unchanged. Certainly, nothing which would lead to a contrary conclusion appears in the papers on the motions and the exhibits annexed thereto.

Accordingly, I conclude as a matter of law that the bankrupt was insolvent within the bankruptcy definition when the act of bankruptcy was committed and when the petition was filed.

It appears that within the four-months period and while insolvent, the bankrupt committed the fifth act of bank-

ruptcy; that it was insolvent when the involuntary petition in bankruptcy was filed; and that the petitioning creditors are not disqualified from acting as petitioning creditors. Accordingly, there is no genuine issue as to any material fact to be tried. The petitioning creditors are entitled to summary judgment as a matter of law decreeing that Blair be adjudged a bankrupt.

Settle order upon three days' notice in conformity with the foregoing.

Dated: New York, New York
April 13, 1971

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REFEREE IN BANKRUPTCY

Petition for Review

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

To the Honorable Judges of the Southern District of New York:

The petition of Blair & Co., Inc. and Patrick E. Scorese, as Liquidator appointed by the New York Stock Exchange for Blair & Co., Inc., respectfully represents:

1. Petitioners are aggrieved by the order made and entered herein on April 27, 1971 by the Honorable Asa S. Herzog, Referee in Bankruptcy, which order provided as follows:

> "ORDERED, that the motion of the alleged Bankrupt and the Liquidator for summary judgment dismissing the involuntary petition, and the motion of the petitioning creditors to amend the allegation of the second act of bankruptcy be, and the same hereby are, in all respects denied. And it is further
>
> ORDERED, that the cross-motion of the petitioning creditors for summary judgment adjudicating BLAIR & CO., INC. a Bankrupt be, and the same hereby is in all respects granted, and it is further
>
> ADJUDGED, that the said BLAIR & CO., INC. is a Bankrupt under the Act of Congress relating to bankruptcy,

but all proceedings pursuant to this adjudication, except to review this order, are stayed subject to the order of Hon. Herbert Loewenthal, the Referee in charge of this case."

A copy of said order is annexed hereto, marked Exhibit "A", and made a part hereof.

2. Petitioners allege that the making and entry of the order of April 27, 1971 in conformity with the Referee's written opinion of April 13, 1971, and more specifically, the adjudication of Blair & Co., Inc. a bankrupt, was error for the following reasons:

(a) The Referee in Bankruptcy was without statutory authority for holding in his written opinion of April 13, 1971, a copy of which is annexed hereto and marked Exhibit "B", that the appointment of the Liquidator "falls squarely within Bankruptcy Act §3a(5)." (P.9, Exhibit B.) Section 3a(5) of the Bankruptcy Act, 11 U.S.C. §21a(5), the section under and pursuant to which the Referee purported to act, by its very terms applies only to a judicially or statutorily appointed "receiver" or "trustee". Such was not the fact in the case at bar. The Liquidator herein is an agent appointed by the New York Stock Exchange with the consent of the management of Blair for the purpose of liquidating Blair's property, but is not vested with title thereto.

(b) The Referee in Bankruptcy did not consider the plain and unambiguous language of Section 3a(5) of the Bankruptcy Act and its legislative history. The

amendments to said section have never made reference to a liquidating agent or person appointed for the purposes of liquidation, whereas other related sections, to wit, Sections 21a(21) and 69b do specifically refer to and include within their coverage a liquidating agent or person appointed for the purposes of liquidating the assets of a bankrupt. If Congress had intended to further broaden the scope of Section 3a(5), then it would have clearly stated, as it did in Sections 2a(21) and 69b, that the appointment of an agent authorized to take possession of or to liquidate a person's property constitutes an act of bankruptcy. Consequently, the appointment of Mr. Scorese as Liquidator for Blair cannot be deemed to constitute the commission of the fifth act of bankruptcy.

(c) The Referee in Bankruptcy, in his construction of Section 3a(5), in effect, has, created a new act of bankruptcy which is not within the present statutory language. The Bankruptcy Act should not be enlarged by judicial fiat in order to include factual patterns which appear to be analogous to specific acts of bankruptcy but which have been manifestly excluded by Congress.

(d) The Referee in Bankruptcy erred in concluding as a matter of law that Blair & Co., Inc. was insolvent within the meaning of Section 1(19) of the Bankruptcy Act. No evidence was submitted to the Referee and no hearing was had on the issue of insolvency. Nevertheless, the Referee found that on June 30, 1970, Blair was insolvent from his interpretation of a balance

sheet dated June 30, 1970 and annexed to the papers on the cross-motion for summary judgment. Said balance sheet was pure hearsay and not admissible as evidence. Without any factual basis therefor, the Referee further determined that "the situation, if not worsened on September 21, 1970 when the Liquidator was appointed, and on September 29, 1970, when the involuntary petition was filed, was at the very least, unchanged." (p.23, Exhibit B.) The conclusions of the Referee amounted to findings of fact which had no evidentiary basis. Consequently, petitioners were deprived of their right to a hearing on the issue of insolvency, since factual issues have been raised by the pleadings herein.

(e) The Referee erred in holding that the involuntary petition in bankruptcy herein was filed by "creditors" within the purview of Section 59b of the Bankruptcy Act, 11 U.S.C. §95. In fact, the individuals who filed said involuntary petition, to wit, J. P. Foley & Co., John P. Foley, Jr. and Anita Salisbury, were subordinated investors of Blair & Co., Inc. and thus lack the statutory capacity to file an involuntary petition in bankruptcy.

3. Petitioners respectfully submit that the above-described action of the Referee in Bankruptcy was contrary to law.

WHEREFORE, petitioners pray that the aforesaid action of the Referee be reviewed by a United States District Judge in accordance with the provisions of the Bankruptcy

Act, that said action be reversed, that the involuntary petition in bankruptcy filed against Blair & Co., Inc. be dismissed and that said Blair & Co., Inc. be adjudged not a bankrupt as a matter of law and that petitioners have such other and further relief as is just.

Dated: New York, New York
May 7, 1971.

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WEIL, GOTSHAL & MANGES
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By: DONALD ZOELLER
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EXHIBIT "A" ANNEXED TO PETITION FOR REVIEW

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Bankruptcy No. 70 B 755

ORDER OF ADJUDICATION

In the Matter

—of—

BLAIR & CO., INC.,

Bankrupt.

At New York, New York, in said District, on the 27th day of April, 1971.

The Petition of J. P. FOLEY & Co., INC., JOHN P. FOLEY, JR., and ANITA SALISBURY, that BLAIR & Co., INC. be adjudged a Bankrupt under the Act of Congress relating to bankruptcy, having been filed on the 29th day of September, 1970, and an answer having been interposed to the said Petition within the time prescribed by the Bankruptcy Act, and a motion having been made by the alleged Bankrupt and PATRICK E. SCORESE, Liquidator of the assets of the alleged Bankrupt, by notice of motion dated November 2, 1970 for summary judgment dismissing the involuntary petition, and the petitioning creditors having cross-moved for summary judgment adjudicating BLAIR & Co., INC. a Bankrupt, and the said petitioning creditors having further moved to amend the allegation of the second act of bankruptcy in the involuntary petition by inserting the

figure $5,000.00 therein, and having further moved for an order requiring the Bankrupt to appear for deposition upon oral examination and requiring the Bankrupt and the Liquidator to produce at said examination the books and records relating to the issues presented by the petition and answer, and all of the aforesaid motions having been referred to the undersigned Referee for hearing and determination by order of CHIEF JUDGE SIDNEY SUGARMAN dated February 2, 1971, and the undersigned Referee having heard argument on the aforesaid motions on the 11th day of March 1971, it is

ORDERED, that the motion of the alleged Bankrupt and the Liquidator for summary judgment dismissing the involuntary petition, and the motion of the petitioning creditors to amend the allegation of the second act of bankruptcy be, and the same hereby are in all respects denied. And it is further

ORDERED, that the cross-motion of the petitioning creditors for summary judgment, adjudicating BLAIR & CO., INC. a Bankrupt, be, and the same hereby is in all respects granted, and it is further

ADJUDGED, that the said BLAIR & CO., INC. is a Bankrupt under the Act of Congress relating to bankruptcy, but all proceedings pursuant to this adjudication, except to review this order, are stayed subject to the order of Hon. Herbert Loewenthal, the Referee in charge of this case.

/s/ ASA S. HERZOG
Referee in Bankruptcy

EXHIBIT "B" ANNEXED TO PETITION FOR REVIEW

This exhibit is a copy of the Decision on cross-motions for summary judgment, rendered by the Honorable Asa S. Herzog, Referee in Bankruptcy, dated April 13, 1971. It is printed heretofore at pages 210a to 228a.

Decision of Hon. Irving Ben Cooper, U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

Appearances:

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New York, New York 10005

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Of Counsel

IRVING BEN COOPER, *D. J.*

Decision of Hon. Irving Ben Cooper, U.S.D.J.

The petition to review the determination of Referee in Bankruptcy, Hon. Asa S. Herzog, is denied. The Referee's order is confirmed.

In view of both the form and substance of the debentures issued, the petitioners were creditors of the bankrupt and were authorized to file a petition in bankruptcy under §59(b) of the Bankruptcy Act, (Act) 11 U.S.C. §95(b). New York Stock Exchange Rule 325; Cf. *Goldstein* v. *Wolfson*, 132 F.2d 624, (2d Cir. 1942).

Referee Herzog correctly determined that Blair was "insolvent" within the meaning of Section 1(19) of the Act, 11 U.S.C. §1(19) on September 25, 1970. The conclusion was fully justified on all the evidence before him. In particular, no triable issue of fact was created as to the alleged facts contained in the balance sheet which, in our opinion, was properly considered and weighed. See *Huron Milling* v. *Hedges*, 257 F.2d 258, 262 (2d Cir. 1958); *Smith* v. *Bear*, 237 F.2d 79 (2d Cir. 1956); Fed. R. Civ. P. 56; Rule 801(d)(2), Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (March 1971); Minutes, March 11, 1971, pp. 40-41.

The appointment of the Liquidator by the New York Stock Exchange and his taking of "control" was an act of bankruptcy within the meaning of §3(a)(5) of the Act, 11 U.S.C. §21. We agree with the formulation of this concept by our Judge Weinfeld in *In Re Bonnie Classics*, 116 F.Supp. 646 (S.D.N.Y. 1953):

> "It is not required that the transferee of property be formally 'appointed' as trustee by a ceremonial docu-

ment referring to him as such. The method adopted to effect the transfer is immaterial. It is the end result that counts. Any action by one who is insolvent which effectively causes the transfer of his property to another for final liquidation purposes appoints the transferee a trustee to take 'charge of his property' under Section 3, Sub. a(5)."

Illinois v. *Campbell*, 329 U.S. 362 (1946); see also, *In Re Hayes*, 127 F.Supp. 514 (D.C. Alaska 1955); 1 Collier on Bankruptcy §§ 3.502, 3.503, at 501-503 (14th Ed. 1971); 1 Remington on Bankruptcy §157 at 247, §160 at 249.

We decline to create an exemption from the Act for insolvent brokerage corporations which privately seek to wind-up their affairs pursuant to an agreement between themselves and a stock exchange. Cf. *In re Watts & Sacks*, 190 U.S. 1,27 (1902). As Referee Herzog correctly noted, such would "defeat the objectives of the Act and abort the broad powers of the court of bankruptcy intended for the uniform administration of insolvent estates" as well as "provide an effective means to defeat the exclusive jurisdiction of the bankruptcy courts by denying creditors the right to select their own trustee to effectuate liquidations." Opinion of Referee Herzog, April 13, 1971, p. 11. See *Bonnie Classics*, *supra*, at 648.

So ORDERED:

New York, N.Y.
March 15, 1972

IRVING BEN COOPER
United States District Judge

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Proceedings for an Arrangement

No. 70-B-755

In the Matter

—of—

BLAIR & CO., INC.,

Debtor.

Notice is hereby given that Blair & Co., Inc. ("Blair"), as debtor-in-possession, and Patrick E. Scorese, as Liquidator appointed by the New York Stock Exchange, Inc. for Blair, hereby appeal to the United States Court of Appeals for the Second Circuit from the opinion and order of the Honorable Irving Ben Cooper, United States District Judge, adjudging Blair a bankrupt, entered in this proceeding on the 16th day of March, 1972.

Notice of Appeal

Dated: New York, New York
April 13, 1972

Mitchell Hess Goodman & Abramowitz
Attorneys for Blair & Co., Inc.
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Charles Stillman
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767 Fifth Avenue
New York, New York 10022

By: Harvey R. Miller,
A Member of the Firm of Weil, Gotshal & Manges

To:

Leo H. Bazzos, Esq.
Attorney for J. P. Foley & Co., Inc., John P. Foley, Jr. and Anita Salisbury
521 Fifth Avenue
New York, New York 10017

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of December, one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY
Chief Judge
HON. WALTER R. MANSFIELD
HON. WILLIAM H. TIMBERS
Circuit Judges

In the Matter

of

BLAIR & CO., INC.,
Debtor-Appellant,

PATRICK E. SCORESE,
Liquidator-Appellant,

J. P. FOLEY & CO., INC., JOHN P. FOLEY, JR., and ANITA SALISBURY,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment of the United States Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

Majority Opinion of the United States Court of Appeals for the Second Circuit by Henry J. Friendly, Chief Judge

NOTE: The Majority Opinion of Honorable Henry J. Friendly is reproduced as the first part of Appendix A of the Petition for Writ of Certiorari, commencing on page 10 of the Petition for Writ of Certiorari.

Dissenting Opinion of the United States Court of Appeals for the Second Circuit by William H. Timbers, Judge

NOTE: The Dissenting Opinion of the Honorable William H. Timbers is reproduced as part of Appendix A of the Petition for Writ of Certiorari, commencing on page 22 of the Petition for Writ of Certiorari.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 72-1554

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the nineteenth day of January one thousand nine hundred and seventy-three.

Present:

HON. HENRY J. FRIENDLY,
Chief Judge,

HON. WALTER R. MANSFIELD,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

[CAPTION OMITTED]

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

Order Denying Petition for Rehearing in Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 72-1554

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of January, one thousand nine hundred and seventy-three.

[CAPTION OMITTED]

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

Order Granting Motion to Stay Issuance of Mandate

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of January, one thousand nine hundred and seventy-three.

[CAPTION OMITTED]

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated December 20, 1972, to stay the issuance of the mandate pending application to the Supreme Court of the United States for writ of certiorari pursuant to Rule 41(b) Federal Rules of Appellate Procedure be and it hereby is granted on condition that such application be filed not later than February 9, 1973.

HENRY J. FRIENDLY,
Chief Judge,

WALTER R. MANSFIELD,
Circuit Judge.

Order Modifying Court's Order and Further Extending the Stay of Mandate

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of February, one thousand nine hundred and seventy-three.

In the Matter of

BLAIR & CO., INC.,

Debtor.

BLAIR & CO., INC., and PATRICK E. SCORESE, as Liquidator appointed by the New York Stock Exchange, Inc., for Blair & Co., Inc.,

Appellants,

v.

JOHN P. FOLEY, JR., J. P. FOLEY & CO., INC., and ANITA SALISBURY,

Appellees.

Order Modifying Court's Order and Further Extending the Stay of Mandate

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated January 26, 1973, to modify the court's order of January 29, 1973 so as to stay the mandate of the court pending petition for certiorari provided that such petition is filed on or before February 23, 1973, be and it hereby is granted.

HENRY J. FRIENDLY
Chief Judge

INDEX TO STATUTORY APPENDIX

Bankruptcy Act

Section 2a(21), 11 U.S.C. §11(21) 255a

Section 3a(5), 11 U.S.C. §21a(5) 255a

Section 59b, 11 U.S.C. §95b 255a

Section 69d, 11 U.S.C. §109d 255a

Federal Rules of Civil Procedure

Rule 56, 28 U.S.C. App. 255a

General Rules and Regulations under the Securities Exchange Act of 1934

17 C.F.R. 240, 15c3–1 ..... 261a

Rules of Board of Governors of the New York Stock Exchange

Rule 325 ..... 272a

Section 3c(11), 11 U.S.C. §11(11):

(11) Receiver receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and to all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: *Provided, however*, That such delivery and accounting shall not be required except in proceedings under section 77 and chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall examine and determine the propriety and reasonableness of all disbursements made out of such property by such receiver, trustee, assignee, or agent, either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act, surcharge such receiver, trustee, assignee, or agent the amount of

any disbursement determined by the court to have been improper or excessive; and

Section 3a(5), 11 U.S.C. §21a(5):

Acts of bankruptcy by a person shall consist of his having . . . (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property. . . .

Section 59(b), 11 U.S.C. §95b:

Three or more creditors who have provable claims not contingent as to liability against a person, amounting in the aggregate to $500 in excess of the value of any securities held by them, or, if all of the creditors of the person are less than twelve in number, then one or more of the creditors whose claim or claims equal that amount, may file a petition to have him adjudged a bankrupt; but the claim or claims, if unliquidated, shall not be counted in computing the number and the aggregate amount of the claims of the creditors joining in the petition, if the court determines that the claim or claims cannot be readily determined or estimated to be sufficient, together with the claims of the other creditors, to aggregate $500, without unduly delaying the decision upon the adjudication.

Section 69d, 11 U.S.C. §109d:

Upon the filing of a petition under this Act, a receiver or trustee, appointed in proceedings not under this Act, of any of the property of a bankrupt, an assignee for the

benefit of creditors of a bankrupt, or an agent authorized to take possession of or to liquidate any of the property of a bankrupt shall be accountable to the bankruptcy court, in which the proceeding under this Act is pending, for any action taken by him subsequent to the filing of such bankruptcy petition, and shall file in such bankruptcy court a sworn schedule setting forth a summary of the property in his charge and of the liabilities of the estate, both as of the time of and since, becoming receiver, trustee, assignee, or agent, and a sworn statement of his administration of the estate. Such receiver, trustee, assignee, or agent, with knowledge of the filing of such bankruptcy proceeding, shall not make any disbursements or take any action in the administration of such property without first obtaining authorization therefor from the bankruptcy court.

Federal Rules of Civil Procedure

28 U.S.C. App.

Rule 56. Summary Judgment.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(5) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the

whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, sum-

mary judgment, if appropriate, shall be entered against him.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rules and Regulations—Securities Exchange Act of 1934

17 C.F.R. 240

Rule 15c3-1. Net Capital Requirements for Brokers and Dealers

(a) Every broker or dealer shall have the net capital necessary to comply with all the following conditions:

(1) His aggregate indebtedness to all other persons shall not exceed 2,000 per centum of his net capital; and

(2) He shall have and maintain net capital of not less than $5,000; except that the minimum net capital to be maintained by a broker or dealer meeting all of the following conditions shall be $2,500:

(A) His dealer transactions (as principal for his own account) are limited to the purchase, sale and redemption of redeemable shares of registered investment companies; except that a broker or dealer transacting business as a sole proprietor may also effect occasional transactions in other securities for his own account with or through another registered broker-dealer;

(B) His transactions as broker (agent) are limited to: (i) the sale and redemption of redeemable securities of registered investment companies; (ii) the solicitation of share accounts for savings and loan associations insured by an instrumentality of the United States; and (iii) the sale of securities for the account of a customer to obtain funds for immediate reinvestment in redeemable securities of registered investment companies; and

(C) He promptly transmits all funds and delivers all securities received in connection with his activities as a broker or dealer, and does not otherwise hold funds or securities for, or owe money or securities to, customers.

(*b*) EXEMPTION. (1) The provisions of this rule shall not apply to any broker who is also a licensed insurance agent under the laws of any State or the District of Columbia, whose securities business is limited to effecting transactions in variable annuity contracts as general agent for the issuer, who promptly transmits all funds and delivers all variable annuity contracts received in connection therewith, and who does not otherwise hold funds or securities for or owe money or securities to customers, if the issuer files with the Commission an undertaking satisfactory to it that the issuer will assume responsibility for all valid claims arising out of all activities of such agent in effecting transactions in such variable annuity contracts: *Provided, however,* That a broker transacting business as a sole proprietor who meets all other conditions of this subparagraph (*b*)(1) may also effect occasional transactions in other securities for his own account with or through another registered broker-dealer.

(2) The provisions of this rule shall not apply to any member in good standing and subject to the capital rules of the American Stock Exchange, the Boston Stock Exchange, the Midwest Stock Exchange, the New York Stock Exchange, the Pacific Coast Stock Exchange, the Philadelphia-Baltimore-Washington Stock Exchange, or the Pittsburgh Stock Exchange, whose rules, settled practices and applicable regulatory procedures are deemed by the

Commission to impose requirements more comprehensive than the requirements of this rule: *Provided, however,* That the exemption as to the members of any exchange may be suspended or withdrawn by the Commission at any time, by sending ten (10) days written notice to such exchange, if it appears to the Commission to be necessary or appropriate in the public interest or for the protection of investors so to do.

This exemption shall not be available to the members of any exchange whose capital rules do not provide that in the computation of net capital there shall be a deduction of not less than 10 percent of the contract price of each item in the securities failed to deliver account which is outstanding 40 to 49 calendar days; 20 percent of the contract price of each item in the securities failed to deliver account which is outstanding 50 to 59 calendar days; and 30 percent of the contract price of each item in the securities failed to deliver account which is outstanding 60 or more calendar days.

(3) The Commission may, upon written application, exempt from the provisions of this rule, either unconditionally or on specified terms and conditions, any broker or dealer who satisfies the Commission that, because of the special nature of his business, his financial position, and the safeguards he has established for the protection of customers' funds and securities, it is not necessary in the public interest or for the protection of investors to subject the particular broker or dealer to the provisions of this rule.

(c) DEFINITIONS. For the purpose of this rule:

(1) The term "aggregate indebtedness" shall be deemed to mean the total money liabilities of a broker or dealer arising in connection with any transaction whatsoever, including, among other things: money borrowed; money payable against securities loaned and securities "failed to receive"; the market value of securities borrowed (except for delivery against customers' sales) to the extent to which no equivalent rule is paid or credited; customers' free credit balances; credit balances in customers' accounts having short positions in securities; and equities in customers' commodities futures accounts; but excluding

(A) Indebtedness adequately collateralized, as hereinafter defined, by securities or spot commodities owned by the broker or dealer;

(B) Indebtedness to other brokers or dealers adequately collateralized, as hereinafter defined, by securities or spot commodities owned by the broker or dealer;

(C) Amounts payable against securities loaned which securities are owned by the broker or dealer;

(D) Amounts payable against securities failed to receive which securities were purchased for the account of, and have not been sold by, the broker or dealer;

(E) Indebtedness adequately collateralized, as hereinafter defined, by exempted securities;

(F) Amounts segregated in accordance with the Commodity Exchange Act and the rules and regulations thereunder;

(G) Fixed liabilities adequately secured by real estate or any other asset which is not included in the computation of "net capital" under this rule;

(H) Liabilities on open contractual commitments; and

(I) Indebtedness subordinated to the claims of general creditors pursuant to a satisfactory subordination agreement, as hereinafter defined;

(2) The term "net capital" shall be deemed to mean the net worth of a broker or dealer (that is, the excess of total assets over total liabilities), adjusted by

(A) Adding unrealized profits (or deducting unrealized losses) in the accounts of the broker or dealer and, if such broker or dealer is a partnership, adding equities (or deducting deficits) in accounts of partners, as hereinafter defined;

(B) Deducting fixed assets and assets which cannot be readily converted into cash (less any indebtedness secured thereby) including, among other things, real estate; furniture and fixtures; exchange memberships; prepaid rent, insurance and expenses; good will; organization expenses; all unsecured advances and loans; customers' unsecured notes and accounts; and deficits in customers' accounts, except in bona fide cash accounts within the meaning of section 4(c) of Regulation T of the Board of Governors of the Federal Reserve System;

(C) Deducting the percentages specified below of the market value of all securities, long and short (except exempted securites) in the capital, proprietary and other accounts of the broker or dealer, including securities loaned

to the broker or dealer pursuant to a satisfactory subordination agreement, as hereinafter defined, and if such broker or dealer is a partnership, in the accounts of partners, as hereinafter defined:

(i) In the case of nonconvertible debt securities having a fixed interest rate and a fixed maturity date which are not in default, if the market value is not more than 5 percent below the face value, the deduction shall be 5 percent of such market value; if the market value is more than 5 percent but more than 30 percent below the face value, the deduction shall be a percentage of market value, equal to the percentage by which the market value is below the face value; and if the market value is 30 percent or more below the face value, such deduction shall be 30 percent;

(ii) In the case of cumulative, nonconvertible preferred stock ranking prior to all other classes of stock of the same issuer, which is not in arrears as to dividends, the deduction shall be 20 percent;

(iii) In the case of a debt security not in default which has a fixed rate of interest and a fixed maturity date and which is convertible into an equity security, the deduction shall be as follows: If the market value is 90 percent or more of the face value, the deduction shall be 30 percent of the market value, but in no event shall such deduction reduce the value of such security below 80 percent of face value for the purposes of this rule; if the market value is below the face value by more than 10 percent but not more than 30 percent, the deduction shall be a percentage of market value equal to the percentage by which the market value is below the face value; if the market value is 30 per-

cent or more below the face value, the deduction shall be 30 percent.

(iv) On all other securities, the deduction shall be 30 percent;

Provided, however, That such deduction need not be made in the case of (1) a security which is convertible into or exchangeable for other securities within a period of 30 days, subject to no conditions other than the payment of money, and the other securities into which such security is convertible, or for which it is exchangeable, are short in the accounts of such broker or dealer or partner, or (2) a security which has been called for redemption and which is redeemable within 90 days.

(D) Deducting 30 percent of the market value of all "long" and all "short" future commodity contracts (other than those contracts representing spreads or straddles in the same commodity and those contracts offsetting or hedging any "spot" commodity positions) carried in the capital, proprietary or other accounts of the broker or dealer and, if such broker or dealer is a partnership, in the accounts of partners as hereinafter defined;

(E) Deducting, in the case of a broker or dealer who has open contractual commitments, the respective deductions as specified in subparagraph (C) above, from the value (which shall be the market value whenever there is market) of each net long and each net short position contemplated by any existing contractual commitment in the capital, proprietary and other accounts of the broker or dealer and, if such broker or dealer is a partnership, in

accounts of partners, as hereinafter defined: *Provided, however*, That this deduction shall not apply to exempted securities, and that the deduction with respect to any individual commitment shall be reduced by the unrealized profit, in any amount not greater than the deduction provided for in subparagraph (C), (or increased by the unrealized loss) in such commitment; and that in no event shall an unrealized profit on any closed transactions operate to increase net capital.

(F) Deducting an amount equal to 1½ percent of the market value of the total long or total short future contracts in each commodity, whichever is greater, carried for all customers;

(G) Excluding liabilities of the broker or dealer which are subordinated to the claims of general creditors pursuant to a satisfactory subordination agreement, as hereinafter defined; and

(H) Deducting, in the case of a broker or dealer who is a sole proprietor, the excess of (1) liabilities which have not been incurred in the course of business as a broker or dealer over (2) assets not used in the business.

(I) Deducting 10 percent of the contract price of each item in the securities failed to deliver account which is outstanding 40 to 69 calendar days; deducting 20 percent of the contract price of each item in the securities failed to deliver account which is outstanding 10 to 39 calendar days; and deducting 30 percent of the contract price of each item in the securities failed to deliver account which is outstanding 69 or more calendar days.

Rules and Regulations—Securities Exchange Act of 1934

(5) The term "exempted securities" shall mean those securities specifically defined as exempted securities in section 3(a) of the Act;

(6) The term "accounts of partners," where the broker or dealer is a partnership, shall mean accounts of partners who have agreed in writing that the equity in such accounts maintained with such partnership shall be included as partnership property;

(7) The term "unsecured receivables" shall include underwriting, when-issued, when-distributed and delayed delivery contracts, advancements of gain and sales commissions to foreign exchanges, and spot (cash) commodities contracts, but shall not include contractual regular way purchases and sales of securities and contracts to accommodate failures; a review of contracts of purchase or sale of the same security established, if at all, only upon demand may be treated as an individual commitment;

(8) Indebtedness shall be deemed to be "adequately collateralized" within the meaning of this rule, when the difference between the amount of the indebtedness and the market value of the collateral is sufficient to make the loan acceptable as a fully secured loan to banks regularly making comparable loans to brokers or dealers in the community;

(9) The term "satisfactory subordination agreement" shall mean a written agreement duly executed by the broker or dealer and the lender, which agreement is binding and enforceable in accordance with its terms upon the lender, his creditors, heirs, executors, administrators, and assigns,

and which agreement satisfies all of the following conditions:

(A) It effectively subordinates any right of the lender to demand or receive payment or return of the cash or securities loaned to the claims of all present and future creditors of the broker or dealer;

(B) The cash or securities are loaned for a term of not less than 1 year;

(C) It provides that the agreement shall not be subject to cancellation by either party, and that the loan shall not be repaid and the agreement shall not be terminated, rescinded or modified by mutual consent or otherwise if the effect thereof would be to make the agreement inconsistent with the conditions of this rule or to reduce the net capital of the broker or dealer below the amount required by this rule;

(D) It provides that no default in the payment of interest or in the performance of any covenant or condition by the broker or dealer shall have the effect of accelerating the maturity of the indebtedness;

(E) It provides that any notes or other written instruments evidencing the indebtedness shall bear on their face an appropriate legend stating that such notes or instruments are issued subject to the provisions of a subordination agreement which shall be adequately referred to and incorporated by reference;

(F) It provides that any securities or other property loaned to the broker or dealer pursuant to its provisions may be used and dealt with by the broker or dealer as part

of his capital and shall be subject to the risks of the business; and

(G) Two copies of such agreement, and of any notes or written instruments evidencing the indebtedness, are filed, within 10 days after such agreement is entered into, with the Regional Office of the Commission for the region in which the broker or dealer maintains his principal place of business, together with a statement of the full name and address of the lender, the business relationship of the lender to the broker or dealer, and whether the broker or dealer carried funds or securities for the lender at or about the time the agreement was entered into. If each copy of such agreement is bound separately and clearly marked "Non-Public" such agreements shall be maintained in a nonpublic file: *Provided, however,* That they shall be available, for official use, to any official or employee of the United States or any state; to any national securities exchange and any registered national securities association of which the broker or dealer filing such agreements is a member; and to any other person to whom the Commission authorizes disclosure in the public interest.

(8) The term "customer" shall mean every person except the broker or dealer: *Provided, however,* That partners who maintain "accounts of partners" as herein defined shall not be deemed to be customers insofar as such accounts are concerned.

Rules of Board of Governors of the New York Stock Exchange

¶ 2225 Capital Requirements for Member Organizations and Individual Members

General provisions

Rule 325. (a) No member or member organization doing any business with others than members or member organizations or doing a general business with the public, except a member or member organization subject to supervision by State or Federal banking authorities, shall permit, in the ordinary course of business as a broker, his or its Aggregate Indebtedness to exceed 2000 per centum of his or its Net Capital, which Net Capital shall be not less than $50,000 in the case of a member organization carrying any accounts for customers and shall be not less than $25,000 in the case of any other members or member organization subject to this rule, unless a specific temporary exception is made by the Exchange in the case of a particular member or member organization due to unusual circumstances.

The initial Net Capital of a member corporation shall be at least 120% of the Net Capital required to be maintained by this rule.

The Exchange may at any time or from time to time in the case of a particular member or member organization prescribe greater requirements than those prescribed herein.

Each member or member organization shall promptly notify the Exchange if his or its Net Capital does not equal or exceed the minimum required by this rule.

Rules of Board of Governors of the New York Stock Exchange

Not less than 25% of the net worth of a member corporation shall be attributable to capital stock, except that with respect to any member corporation which has outstanding any freely transferable security (1) not less than 50% of such corporation's net worth shall be attributable to capital stock and (2) at least 25% of the corporation's net worth shall be attributable to voting common stock.

Definitions

(b) For the purpose of this rule—

(1) The term "proprietary accounts" shall include capital accounts of partners or sole proprietor, investment and trading accounts, participations in joint accounts, accounts of partners which are covered by agreements, approved by the Exchange, providing for the inclusion of equities therein as partnership property and borrowings covered by subordination agreements approved by the Exchange;

(2) the term "aggregate indebtedness" shall include the total money liabilities of the member or member organization in all accounts other than customers' and brokers' accounts for commodity future contracts; plus equities in customers' and brokers' accounts for commodity future contracts; plus the market value of securities borrowed (other than for delivery against customers' sales) for which no equivalent value is paid or credited, exclusive of the following:

(A) money borrowed (adequately collateralized) on securities, spot commodities or other assets owned by

the member, member firm or general partner thereof, or a member corporation and on those subordinated to general creditors;

(B) money payable against securities loaned which are owned by the member, member firm or general partner thereof, or a member corporation and those subordinated to general creditors;

(C) money payable against securities failed to receive in connection with transactions for the account of the member, member firm or general partner thereof, or a member corporation and for accounts subordinated to general creditors;

(D) money borrowings adequately collateralized by securities exempted from registration under the Securities and Exchange Act of 1934, otherwise than by action of the Securities and Exchange Commission;

(E) liabilities subordinated to general creditors pursuant to a separate agreement approved by the Exchange;

(F) equities in customers' commodity accounts segregated under the Commodity Exchange Act;

(G) equities in general partners' commodity accounts and credit balances in other accounts of general partners; and

(H) liabilities on open contractual commitments.

* * * * *

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IN THE

Supreme Court of the United States

FEBRUARY TERM, 1973

No. ....72 - 1154

In the Matter
of
BLAIR & CO., INC.,
Debtor.

JOHN P. FOLEY, JR., J. P. FOLEY & CO., INC. and ANITA SALISBURY,
Petitioners,
against
BLAIR & CO., INC. and PATRICK E. SCORESE, as Liquidator appointed by the New York Stock Exchange, Inc. for BLAIR & CO., INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEO H. RAINES,
Attorney for Petitioners,
521 Fifth Avenue,
New York, N. Y. 10017
(212) MU 7-0477.

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IN THE

Supreme Court of the United States

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, John P. Foley, Jr., J. P. Foley & Co., Inc., and Anita Salisbury, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the

Second Circuit to review a determination of that Court rendered on the 11th day of December, 1972, setting aside an order of the United States District Court for the Southern District of New York entered on March 15, 1972, which confirmed an order of Hon. Asa S. Herzog, Referee in Bankruptcy, dated April 27, 1971, adjudicating Blair & Co., Inc., a Bankrupt, the determination of the Court of Appeals for the Second Circuit directing the Referee aforementioned to vacate the adjudication and dismiss the Involuntary Petition in Bankruptcy.

Opinions Below

1. The opinion of Hon. Asa S. Herzog, Referee in Bankruptcy, is appended hereto in full in Appendix A.

2. The opinion of Hon. Irving Ben Cooper, United States District Judge in the United States District Court for the Southern District of New York is appended hereto in full in Appendix B.

3. The opinion of the United States Court of Appeals for the Second Circuit decided on December 11, 1972, is appended hereto in full in Appendix C. A Petition for Rehearing was denied on January 29, 1973, with no opinion.

4. A Motion for a Stay of Mandate of the United States Court of Appeals for the Second Circuit was granted on February 2, 1973, staying the mandate of the said Court to February 23, 1973, pursuant to Rule 28(c) of said Court.

Jurisdiction

The jurisdiction of this Court is invoked upon the ground that the Court of Appeals for the Second Circuit has rendered a decision by a divided Court in conflict with every other decision rendered by any Court on the same subject,

and in so doing, has thwarted the expresed intention of Congress, and has created a realistic potential for chaos in the field of insolvency where no such potential had previously existed. This is an important question of Federal law, which requires the intercession of, and should be settled by, this Court, as the decision has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Question Presented

1. Section 3(a) of the Bankruptcy Act (11 U.S.C. § 21(a)(5)) designates as an Act of Bankruptcy:

> "Acts of bankruptcy by a person shall consist of his having
>
> • • •
>
> (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."

The Court of Appeals in an absolute departure from every text and every precedent involving an interpretation of this Section has reversed an Order of Adjudication upon the ground that a liquidator in charge of the property of the Bankrupt, with all of the powers of a Receiver or Trustee, was not appointed by a Court, but was appointed by contract, and, therefore, did not come within the scope of the above quoted Section.

Statement of Case

Blair & Co., Inc., is a Delaware corporation, which was engaged in the stock brokerage business on Wall Street in New York, as well as in multiple branches throughout the nation. It suffered severe financial reverses in 1969, and

1970, and in the late summer of 1970, decided to terminate its business by liquidation. It entered into a contract with the New York Stock Exchange, by the terms of which the New York Stock Exchange, using the token of a $1,000 loan to Blair & Co., Inc., was given the power to appoint a liquidator to take charge and conduct the liquidation. On or about September 25, 1970, Patrick E. Scorese was appointed liquidator pursuant to this contract, and took over all of the affairs of Blair & Co., Inc., under a broad power of attorney containing all of the powers, and more, of any Receiver or Trustee that could have been appointed by a Court, except that he served without bond, and with no Court control. Petitioning Creditors then filed an Involuntary Petition in Bankruptcy on or about September 29, 1970, alleging a fraudulent conveyance, preferential transfers and the appointment of the Liquidator as Acts of Bankruptcy.

Blair & Co., Inc., and the Liquidator moved for summary judgment seeking to dismiss the Involuntary Petition upon the grounds that the petitioners were subordinated creditors who were not empowered to file such a petition, arguing that Blair & Co., Inc., was not insolvent, and attacking the form of the three Acts of Bankruptcy alleged. There was no dispute as to the actual facts, and Petitioning Creditors cross-moved for summary judgment seeking an Order of Adjudication. Hon. Asa S. Herzog, Referee in Bankruptcy, dismissed the first two acts of Bankruptcy on technical grounds, but held that the appointment of the Liquidator constituted an Act of Bankruptcy under § 3(a)(5) of the Bankruptcy Act. He also held that Petitioning Creditors were bona fide creditors with the right to file the Involuntary Petition, and also held that Blair & Co., Inc., was clearly insolvent. He directed that adjudication be granted, and an order to that effect was entered forthwith.

A Petition to Review was taken to the United States District Court for the Southern District of New York, and

Hon. Irving Ben Cooper, United States District Judge, denied the Petition to Review and confirmed the adjudication. An appeal was taken to the Court of Appeals for the Second Circuit, which reversed, by a divided Court, the previous findings of the Honorable Referee and District Court Judge, Hon. Henry J. Friendly writing the majority opinion, in which he specifically excluded a liquidator not appointed by a Court from the scope of § 3(a)(5). In a dissent, Judge William H. Timbers rejected this conclusion, contending that an interpretation of an act based upon language expressly eliminated from a Statute (in 1926), which results in the defeat of a party, whose position falls squarely within the remaining language, was not the most sensible interpretation of the Act.

The case, therefore, presents to this Court an undisputed set of facts (the questions of the right of the Petitioning Creditors to act as such, and the question of the insolvency having been expressly rejected as issues by the Court of Appeals) to which a question of interpretation of a Federal law must be applied, in the light of the law as it presently exists, and the history of that law as it first evolved and was eventually amended and changed into its present form.

Argument Amplifying Reason Relied Upon for Allowance of Writ

The jurisdiction of this Court is properly invoked on the ground that the order of the Court of Appeals finally determines the Bankruptcy proceeding in that it directs the vacatur of the Order of Adjudication and the dismissal of the Petition.

The question on this appeal is of great public concern, because it creates a legally sanctioned device for fraudulent and collusive dissolutions of insolvent companies beyond the reach of the Federal Bankruptcy Courts. The

liquidation of insolvent companies is, and always has been, a troublesome problem to the business community of this nation. It has been axiomatic that control of liquidations should rest in the creditor body, as it is they, who truly bear the losses of insolvency. The right to interrogate, investigate, and to seek to recover dissipated or fraudulently conveyed assets, is a basic right of creditors. Although Bankruptcy has often been referred to as a means of rehabilitation, it has never lost its basic character of providing a means and a forum through which creditors could assert their prerogative to seek out the causes of insolvency, and to liquidate and seek to obtain a maximum recovery through the medium of their own diligence. Any attempt to interfere with the basic right of creditors to control and supervise liquidations of their insolvent debtors has been consistently and sternly rejected.

It is in the light of these principles that this Court has uniformly held that the Bankruptcy Law is paramount, and the jurisdiction of the Federal Courts in Bankruptcy is essentially exclusive, and

> "that the intent of the bankruptcy law is to place the administration of affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts."

Re: Watts & Sachs, 190 U. S. 1, 27, 28.

The majority opinion of the Court of Appeals is a distinct and abrupt departure from everything that has been written on the question involved on this appeal. In 1941, the District Court for the Western District of Oklahoma held that the appointment of a liquidator, not appointed by a Court, came within the scope of § 3(a)(5). (In re: *R. V. Smith Co.,* 38 F. Supp. 57, 62.) Attorneys and members of the business community had ample reason to presume that the principle of *stare decisis* made this the law of the land. COLLIER ON BANKRUPTCY (V. 1 § 3.502) rely-

ing on the *Smith* case, stated that § 3(a)(5) includes

> "liquidation agents generally who . . . may not be appointed by a court."

This doctrine is enunciated further in § 3.503 thereafter. REMINGTON ON BANKRUPTCY (V. 1 § 157) is to the same effect.

The majority opinion's sudden departure in interpretation of this previously well-established principle constitutes a severe setback to the overriding principle of the exclusivity of the Bankruptcy Courts. Paraphrasing REFEREE HERZOG in his opinion, the decision of the Appellate Court sought to be reviewed here, has in effect held that the exclusive jurisdiction of the Bankruptcy Court can be defeated, and creditors denied the right to select their own trustee to control a liquidation, by the simple expedient of the appointment of a private liquidator by the insolvent debtor itself. It would be strange to hold that the appointment of a State Court Receiver, bonded and under the control of a Court, or the designation of a trustee through a Deed of Trust, or the execution of an Assignment for the Benefit of Creditors, may all be superseded by reason of the paramount and exclusive jurisdiction of the Bankruptcy Courts, yet, the private appointment of a hand-picked liquidator, selected by the insolvent itself, cannot be so superseded. Such a holding opens a broad highway for corruption and fraud. Officers and directors of insolvent companies could secrete and dissipate assets and make fraudulent conveyances without fear of investigation by a liquidator of their own choosing. Certainly, this is not the intent of the laws of the land, and it is certainly not in the best interests of the business community, and it is extremely doubtful that Congress ever intended such a result.

Congress in enacting § 3(a)(5) of the Bankruptcy Act in its present form in 1938, specifically asserted one of its purposes to be to broaden "the scope of this act of bank-

ruptcy in order to reach the widely prevalent abuse of collusive equity receiverships". This purpose is justifiable and duly warranted, but it is inconsistent to interpret a law enacted with such intent, as to hold that while it justifies the filing of a Petition in Bankruptcy by reason of the appointment of a collusive equity receivership by a friendly court, it could not be used as a basis for superseding a collusive private liquidation.

In the instant case, a stock brokerage concern, which was a member of the New York Stock Exchange, and whose principal officers were members of the New York Stock Exchange, takes the position that while a State Court Receivership could have been the basis for the filing of an Involuntary Petition in Bankruptcy, the appointment of a liquidator, privately selected through joint agreement between the insolvent debtor and the New York Stock Exchange, which could possibly be as collusive as any possible collusive equity receivership, if not more so, would not justify and sustain an Involuntary Petition in Bankruptcy.

Such a contention flies in the face of the established policy granting exclusive jurisdiction of liquidations in the Bankruptcy Courts. The opinions of the learned Referee and the Court on the District Court level clearly maintain that any difference between a Court-appointed Receiver and a privately selected liquidator did not warrant a distinction in the legal effect thereof, insofar as each constitutes an act of bankruptcy within the intent of § 3(a)(5). Certainly, to hold that a liquidator, who is expressly empowered to give good and clear title to real and personal property, differs from a receiver or a trustee in whom title may vest only by virtue of long-established common law or a Statute, would be to indulge in meaningless semantics, and to consider form greater than substance.

The concept of the appointment of a receiver or trustee in charge of a debtor's property as an act of bankruptcy

was first enacted in 1903, and it defined such appointment by using the phrase "under the laws of a State, or a Territory, or of the United States". However, in 1926, Congress expressly repealed the words, "under the laws of a State, of a Territory, or of the United States", yet the majority opinion disregarded this repeal, and in effect holds that it is still part of the existing law, although it plainly is not.

Quoting Mr. Justice Trimble in his dissenting opinion:

> "where the effect of such a reading is to hold in favor of a party whose position relies on language expressly eliminated from the statute, and thereby to defeat a party whose position falls squarely within the remaining language, I should have thought that we would construe the amendment in the most sensible, rather than the narrowest manner."

In effect, the majority opinion contends that that which was repealed in 1926, was not repealed, and has decided this case on the basis of such non-repealer. It is respectfully felt that this Court should review such a narrow and unlikely conclusion.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A—Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 144—September Term, 1972.

(Argued November 9, 1972 Decided December 11, 1972.)

Docket No. 72-1554

In the Matter

of

BLAIR & Co., INC.,

Debtor.

BLAIR & Co., INC. and
PATRICK E. SCORESE, as Liquidator appointed by the New York Stock Exchange, Inc. for
BLAIR & Co., INC.,

Appellants,

—against—

JOHN P. FOLEY, JR., J. P. FOLEY & Co., INC. and
ANITA SALISBURY,

Appellees.

Before:

FRIENDLY, *Chief Judge,*
MANSFIELD and TIMBERS, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* denying a petition to review an order of Referee Asa S.

Herzog adjudicating Blair & Co., Inc. an involuntary bankrupt. Reversed, with instructions to direct the referee to vacate the order of adjudication.

HARVEY R. MILLER, ESQ., New York, N.Y. (Charles Seligson, Esq., Weil, Gotshal & Manges, and Michael L. Cook, Esq., New York, N.Y., of Counsel), *for Patrick E. Scorese, Liquidator-Appellant,*

—and—

(Mudge Rose Guthrie & Alexander, New York, N.Y., of Counsel), *for Blair & Co., Inc., Debtor-Appellant.*

LEO H. RAINES, ESQ., New York, N.Y., *for Appellees.*

FRIENDLY, *Chief Judge:*

This appeal raises an interesting question concerning the interpretation of § 3a(5) of the Bankruptcy Act. Under that subsection it is an act of bankruptcy if any person

> (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property.

Blair & Co., Inc. (Blair), a Delaware corporation, was engaged in the general brokerage and commission business, with its principal office in New York City. It was a member of the New York Stock Exchange (NYSE) and two other exchanges. At the time of its adjudication as an involuntary bankrupt, it had some 28,000 customer accounts and held more than $75,000,000 in securities, some $40,000,000 of which, including those of customers, were pledged to banks as collateral for loans of approximately $30,000,000.

As a result of operating losses and a concomitant shrinkage of capital, Blair, in the early summer of 1970, began a program of self-liquidation, which involved the transfer of customer accounts to other broker-dealers and the delivery of securities to customers requesting this. Allegedly Blair believed at the time that its resources were sufficient to enable it to discharge its obligations to all customers and general creditors. Late in September, Blair concluded that implementation of the program might require the assistance of the Special Trust Fund which NYSE had established in 1964 to avoid the bankruptcy of member firms, with attendant hardship to their customers and loss of confidence in the securities markets. See Constitution of the New York Stock Exchange, art. XIX, § 1.

On September 21, Blair and certain other participants entered into an argeement with NYSE whereby the trustees of the Special Trust Fund would make loans and guarantees to assist Blair's customers against loss. In accordance with standard practice, the agreement provided that, immediately upon the first loan, guarantee or advance by the trustees, NYSE should have the right to appoint a Liquidator of its own choosing. Paragraph VIII of the agreement described the powers and duties of the Liquidator as set forth in the margin.[1] Simultaneously Blair executed an-

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[1] Immediately following his appointment by the Exchange, the Liquidator shall take control of the business and property of the Corporation for the purpose of liquidating the business of the Corporation and shall proceed as follows in connection with the liquidation:

i.) he shall promptly take such steps as he may deem practicable to reduce the Corporation's operating expenses and to dispose of the Corporation's salable assets;

ii.) he shall have power to retain independent public accountants, consultants, counsel and other agents and assistants and shall have power to augment and reduce or eliminate the staff of the Corporation;

iii.) he shall, as soon as practicable, assert and collect or settle all claims and rights of the Corporation;

(footnote continued on following page)

other instrument which more specifically delineated the powers to be conferred on the person who might be appointed, such person being described as "the true and lawful attorney and agent of and for [Blair]."

On September 25, 1970, the trustees of the Special Trust Fund made a first advance of $1,000, which triggered the appointment of Patrick E. Scorese as Liquidator. Although the trustees were allegedly prepared to advance a total of $15.9 million, all payments ceased when, four days later, appellees J. P. Foley & Company, Inc., John P. Foley, Jr., its President, and Anita Salisbury, his secretary (hereinafter collectively referred to as Foley), holders of subordinated debentures of Blair, filed an involntary petition in bankruptcy against Blair in the District Court for the Southern District of New York. After answering and demanding a jury trial, Blair and Scorese moved for summary judgment dismissing the petition; Foley cross-moved for a summary adjudication of bankruptcy. Concluding that Blair's consent to the appointment of Scorese as liquidator constituted the fifth act of bankruptcy, Referee Herzog, in a decision dated April 13, 1971, denied the motion of Blair and Scorese and granted Foley's. The Referee's order of adjudication, entered April 27, 1971, stayed all proceedings subject to the order of Referee Lowenthal, who had been put in charge of the case. On April 15th 1971, Blair filed a petition for relief under Chapter XI of the Bankruptcy Act, § 321, and applied for a stay of adminis-

(footnote continued from preceding page)

iv.) he shall pay any claim against the Corporation considered by him to be a valid claim of any customer of the Corporation;

v.) he shall take such other steps as he deems necessary or appropriate to liquidate the business of the Corporation.

It is agreed that consistent with the duty of the Liquidator to effect a fair and orderly liquidation of the business of the Corporation to enable prompt settlement with its customers, the Liquidator shall act in accordance with what he deems to be good business practice.

tration pursuant to § 325. This appeal followed Judge Cooper's denial, on March 15, 1972, of a petition to review the order of adjudication. So far as the record shows, no trustee has been elected and the liquidator has continued to function.

Although Foley's petition had alleged three acts of bankruptcy, no serious attempt was made to support the first two[2] before the referee, in the district court or here. Blair and Scorese argued at length, but without success, that, because of certain special circumstances unnecessary to detail, Foley was not a subordinated creditor but a stockholder. Although we do not find appellants' arguments on this point legally persuasive, we need not decide the issue since we hold that the referee and the district judge erred in concluding that Blair had committed the fifth act of bankruptcy.

Before attempting to construe § 3a(5), it is useful to remind ourselves of the purpose of requiring an act of bankruptcy as a condition to an involuntary adjudication. As said in 1 Collier, Bankruptcy ¶ 3.03, at 403 (rev. ed. 1971) (footnotes omitted):

> This requirement of alleging acts of bankruptcy appears to be peculiar to Anglo-American jurisprudence. In countries following the Civil Law mere cessation of payment by the debtor is sufficient to ground a creditor's petition. Anglo-American law, however, affords protection against arbitrary or unjust interference with the property of the debtor by providing that he shall not be amenable to bankruptcy at the instance of creditors unless he has done, or suffered to be done, certain acts, principally concerning his property.

The underlying philosophy was also explained by the Supreme Court in a decision which, although arising under

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[2] These were an alleged fraudulent conveyance of a management contract with the Blair Fund and undescribed preferential transfers of $5,000,000 to unknown creditors.

an earlier Bankruptcy Act, applies in many respects to the present statute:

> There is nothing in the Bankruptcy Act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leaves his estate in as good plight and condition as previously.

Cook v. *Tullis*, 85 U.S. (18 Wall.) 332, 340 (1874).

It is undisputed that two of the conditions of § 3a(5) were here fulfilled. Blair was insolvent or unable to pay its debts as they matured, and it permitted the appointment of Scorese to "take charge" of its property in the ordinary meaning of that term. But that is not enough unless Blair permitted Scorese to be appointed as "a receiver or trustee." The crucial question is what Congress meant by these words.

The Liquidator did not meet what is usually regarded as essential to the status of a receiver, namely, appointment by a court.

> A receiver is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation *pendente lite*, when it does not seem reasonable to the court that either party should hold it. He is not the agent or representative of either party to the action, but is uniformly regarded as an officer of the court. . . .

High, A Treatise on the Law of Receivers, ch. 1, § 1, at 2-3 (4th ed. 1910); see *Booth* v. *Clark*, 58 U.S. (17 How.) 338, 348 (1855).[1] Just as a receiver is not, without more, an agent, *Ledbetter* v. *Farmers Bank & Trust Co.*, 142 F.2d 147 (4 Cir. 1944), so an agent, even one with powers as extensive as Scorese's, is not, without more, a receiver. The Liquidator also lacked one element essential to the normal concept of trusteeship, namely, legal title to the property. See Restatement of Trusts, 2d, §§ 2 and 8 & comment *a*. (1959). In this respect the case differs essentially from *In re Bonnie Classics, Inc.*, 116 F. Supp. 646 (S.D.N.Y. 1953), on which the referee and the district court mistakenly relied. Judge Weinfeld there held, with obvious correctness, that the filing of a certificate of dissolution under then § 105 of the New York Stock Corporation Law was an act of bankruptcy under § 3a(5), for the very reason that legal title " 'was vested in the directors as trustees for creditors and stockholders.' " *Id.* at 648.

To look at the matter somewhat more broadly, receivership and trusteeship both entail the consequence, as does the fourth act of bankruptcy, "a general assignment for the benefit of creditors," that creditors cannot pursue their ordinary remedies against the debtor and his property but are relegated to proceeding, in one way or another, with respect to the assignee, receiver or trustee. By establishing the fourth and fifth acts of bankruptcy, Congress made a policy determination that when an insolvent debtor, even with the best of motives, has placed such obstacles in the way of creditors, the latter should be able to invoke a federal statutory procedure which includes the right to choose their own trustee. See *Globe Ins. Co.* v. *Cleveland Ins. Co.*, 10 Fed. Cas. 488, 492 (No. 5486) (C.C.N.D. Ohio

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[1] There are instances in which the term receiver is used to describe a party who has not been appointed by a court. See 1 Clark, A Treatise on the Law and Practice of Receivers § 11 (3d ed. 1959). However, none of the exceptions to the normal usage of the term, see, *e.g.*, 12 U.S.C. § 191, are applicable to this case.

1876), *appeal dismissed*, 98 U.S. 366 (1879). On the other hand, the mere grant of a power of attorney "for the purpose of winding up the affairs" of a corporation is not an assignment for the benefit of creditors and thus does not constitute the fourth act of bankruptcy, *In re Ambrose Matthews & Co.*, 229 F. 309 (D.N.J.), *aff'd*, 236 F. 539 (3 Cir. 1916), since nothing prevents a creditor from pursuing his ordinary remedies. If the grant of such a power of attorney does not constitute the fourth act of bankruptcy, we fail to see why it should constitute the fifth when the words used by Congress would not normally lead to that result.[4]

This conclusion is reinforced by the history of the statute, which the referee and the district court did not discuss. While the Bankruptcy Act of 1898 made a general assignment for the benefit of creditors a fourth act of bankruptcy, 30 Stat. 546, it contained no provision corresponding to the present fifth act. To reconcile a conflict of decisions as to whether the appointment of a receiver or trustee was nevertheless within the fourth act, see statement of the Attorney General, H.R. Doc. No. 9, 58th Cong., 2d Sess. 125 (1903), the Act of February 5, 1903, 32 Stat. 797, added the words "or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States." The effect of the amendment was greatly impaired by the holdings of a number of courts that Congress had used the term insolvency in the bankruptcy sense. See, *e.g*, *In re Wm. S. Butler & Co*, 207 F. 705 (1 Cir.), *cert. denied*, 231 U.S. 752 (1913); *In re Valentine Bohl Co.*, 224 F. 685 (2 Cir. 1915). Some courts had sought to soften the blow by holding that it sufficed under the second clause if the debtor was in fact insolvent in the bankruptcy sense even

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[4] The only case supporting the conclusion below is *In re R. V. Smith Co.*, 38 F. Supp. 57, 62 (W.D. Okla. 1941); we do not find its reasoning to be persuasive.

though the petition had alleged only inability to pay maturing debts. See *Davis* v. *Michigan Trust Co.*, 2 F.2d 194, 196 (6 Cir. 1924) (Mack, J.), *aff'd sub nom. Mellon* v. *Michigan Trust Co*, 271 U.S. 236 (1926), and cases there cited.

In the 1926 amendments to the Bankruptcy Act, Congress adopted the latter decisions by rewording the clause added in 1903 to state, somewhat ungrammatically when read in conjunction with the section's preamble, "or, while insolvent, a receiver or trustee has been appointed, or put in charge of his property." 44 Stat. 663. See H.R. Rep. No. 695, 69th Cong., 1st Sess. 4 (1926); H.R. Rep. No. 877, 69th Cong., 1st Sess. 7 (1926); Colin, An Analysis of the 1926 Amendments to the Bankruptcy Act, 26 Colum. L. Rev. 789, 792 (1926); and McLaughlin, Amendment of the Bankruptcy Act, 40 Harv. L. Rev. 341, 366-68 (1927). The Senate bill, S. 1039, had retained the words "under the laws of a State, of a Territory, or of the United States," see 67 Cong. Rec. 6800 (1926), but the Senate managers consented to their being stricken in the conference, the House managers stating that the "difference consists merely in phraseology," H.R. Rep. No. 1257, 69th Cong., 1st Sess. 8 (1926). The House hearings provide further evidence that the removal of the language was not meant to affect the substance. See Hearings Pursuant to H. Res. 353 on Revision of the Bankruptcy Law Before the House Comm. on the Judiciary, 68th Cong., 2d Sess., ser. 51, at 38-39 (1925); Hearings on H.R. 5221 and H.R. 8119 Before the House Comm. on the Judiciary, 69th Cong., 1st Sess., ser. 4, at 17 (1926). In fact, the words had always been surplusage. A receiver appointed to take charge of a debtor's property is necessarily appointed "under the laws of a State, of a Territory, or of the United States," and a trustee would either be so or would be a common law assignee under the fourth act of bankruptcy—unless the insolvent had appointed him otherwise than for the benefit of all creditors in which case the transaction

would be a fraudulent conveyance within the first act or a preference under the second. The 1926 amendment thus affords no indication that Congress meant "a receiver or trustee" to include a person who had some but not all of the historic attributes of these officers.

The courts continued to read the requirement of insolvency under the 1926 amendment in the bankruptcy sense. See 1 Collier, Bankruptcy, *supra*, ¶ 3.501, at 496. To overcome this, and also to correct its grammer, Congress, in enacting the Chandler Act, changed the provision to its present form, 52 Stat. 844-45. The Senate Report emphasized that the purpose was to broaden the scope of the fifth act of bankruptcy "in order to reach the widely prevalent abuse of collusive equity receiverships." S. Rep. No. 1916, 75 Cong., 3d Sess. 12 (1938); see also H.R. Rep. No. 1409, 75th Cong., 1st Sess. 6 (1937). Not only was there no indication that Congress meant to extend the words "receiver or trustee" beyond their normal meaning to include a liquidating agent, but § 2a(21), which was added in 1938, 52 Stat. 844, shows that when the draftsmen desired to cover such an agent, they considered it necessary to say so and knew how to do it. Section 2a(21) authorizes a bankruptcy court to "[r]equire receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property" to deliver the property in their possession or control to a representative of the bankruptcy court. In 1952, Congress amended § 69d, to provide that upon the filing of a petition "a receiver or trustee, appointed in proceedings not under this Act, of any of the property of a bankrupt, an assignee for the benefit of creditors of a bankrupt, or an agent authorized to take possession of or to liquidate any of the property of a bankrupt" shall be accountable to the bankruptcy court for any action taken subsequent to the filing of a petition, shall file a schedule of assets and liabilities, shall make a sworn statement of his administra-

tion of the estate, and shall not make any disbursements or take other administrative action without authorization from the bankruptcy court. 66 Stat. 426. The House Committee explained:

> Secion 2a(21) gives the court jurisdiction to require receivers or trustees, appointed in proceedings not under the act, as well as assignees for the benefit of creditors and agents authorized to take possession of or to liquidate a person's property, to deliver the property in their possession or under their control to a receiver or trustee appointed under the act. Section 69d, spelling out that power, requires a receiver or trustee, not appointed under the act, of any property of the bankrupt, to account to the bankruptcy court, but does not include the assignee and agent. The bill adds the necessary language and clarification.

H.R. Rep. No. 2320, 82d Cong., 2d Sess. 15 (1952). Here again Congress manifested its belief that a liquidating agent was neither a receiver nor a trustee.

Foley asks us to disregard all this on grounds of policy, an argument that proved successful with the referee and the district judge.[5] While we doubt that we could justify so great a broadening of the words on such grounds, the policy argument is not sufficiently impressive that we need to consider this. It is essential to bear in mind that the first three acts of bankruptcy—fraudulent conveyances, preferences, and failure to vacate or discharge liens—

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[5] These decisions would obviously have meant the end of the NYSE's Special Trust Fund plan, since the Exchange would scarcely advance funds in order to avert a bankruptcy if the attendant designation of a liquidator would enable the few creditors needed to meet the tests of § 59b, *as amended*, 11 U.S.C. § 95(b), to provoke it. For the future this problem is handled by the Securities Investors Protection Act of 1970, 15 U.S.C. §§ 78aaa, *et seq.* Section 5(b)(1)(A)(ii) and (iii) of SIPC, 15 U.S.C. § 78eee(b)(1)(A)(ii) and (iii), gives some slight added support to our conclusion.

apply as fully to action or inaction by a liquidating agent as by the principal. Foley contends that, despite this, the liquidator may make preferential transfers of which creditors may not be aware, may neglect to pursue claims as vigorously as would a trustee in bankruptcy, or may fail to elicit claims which an examination under § 21a would develop. All this would be equally true if Blair had pursued its plan of self-liquidation. Foley's policy arguments are in reality a contention that Congress took the wrong turn when it required creditors to establish an act of bankruptcy and did not permit them to set the procedures of the Act in motion by a showing of insolvency alone.[8] But Congress made the choice long ago in § 1 of the short-lived Bankruptcy Act of 1800, 2 Stat. 1921, and repeated it in § 1 of the Act of 1841, 5 Stat. 440-42, in § 39 of the Act of 1867, 14 Stat. 536, and in the present statute. A court's duty is to construe what the legislature has said, not to substitute a new and debatable notion of policy which so many Congresses have rejected.

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[8] This position finds some support in legal literature. One commentator, who traced the origins of the Anglo-American requirement of an act of bankruptcy, has concluded that, while the requirement was sensible when the objective of bankruptcy law was to deal with the culpable acts of the debtor, this is no longer so now that the primary concern is with the debtor's financial condition rather than his conduct. Treiman, Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law, 52 Harv. L. Rev. 189, 200 (1938). Nevertheless, he believed that, so long as the present definition of insolvency was retained, elimination of the acts of bankruptcy would be "utterly impractical." *Id.* at 211. Proof of insolvency under the existing definition, which describes an "internal condition" of the debtor, he reasoned, could only be obtained by a comprehensive examination of the debtor's financial situation; the requirement of an act of bankruptcy was thus important in preventing the debtor's financial affairs from being pried into at will. The author therefore felt that insolvency would have to be redefined in terms of an inability to meet obligations as they became due—an "external condition," ascertainable without interference into the debtor's affairs—before the acts of bankruptcy could be eliminated. *Id.* at 211-12. See also Note, "Acts of Bankruptcy" in Perspective, 67 Harv. L. Rev. 500 (1954).

The order of the district court is reversed, with instructions to direct the referee to vacate the adjudication and dismiss the petition.

TIMBERS, *Circuit Judge* (dissenting):

Some nineteen years ago, a wise and comprehending judge, in construing Section 3(a)(5) of the Bankruptcy Act, had this to say:

> "I do not think it is necessary to resort to dictionary definition of 'appointment.' It is not required that the transferee of the property be formally 'appointed' as 'trustee' by a ceremonial document referring to him as such. The method adopted to effect the transfer is immaterial. It is the end result that counts. Any action by one who is insolvent which effectively causes the transfer of his property to another for final liquidation purposes appoints the transferee a 'trustee to take charge of his property' under § 3, sub. a(5). By filing the petition for its dissolution the corporation 'procured, permitted or suffered voluntarily * * * the appointment' of such a trustee. Any other construction would defeat the objectives of the Bankruptcy Act and abort the broad powers of the courts of bankruptcy intended for the uniform administration of insolvent estates." *In re Bonnie Classics, Inc.*, 116 F.Supp. 646, 648 (S.D.N.Y. 1953) (Weinfeld, J.) (footnotes omitted).

While *Bonnie Classics* is distinguishable on its facts from the instant case, nevertheless, in my view, the considerations noted there by Judge Weinfeld should lead to the same result here where a corporation has agreed to the appointment of a liquidator with the power to "take control of the business and property of the Corporation for the purpose of liquidating the business of the Corporation."

The comprehensive legislative history set forth in the majority opinion does not compel the result reached by

the majority. The language in the original Bankruptcy Act of 1898 relied on by the majority remained in the statute until 1926. At that point, a broad revision of the Act was effected, including the elimination of the requirement that the appointment of a receiver be by statute or judicial proceeding. 44 Stat. 663. While the majority correctly notes that the principal focus of the drafters of the amendment was on remedying an ambiguity regarding the preliminary requirement of insolvency, and that the elimination of the necessity of formal appointment was said to be simply a matter of change in phraseology, the majority overlooks the fact that if Congress truly had intended to limit the change to those goals, it surely need not have gone as far as it did. The result, as I see it, is that we are asked to find a narrow purpose behind an Act of Congress, despite the failure of Congress to demonstrate that narrow purpose in the statutory language through the use of drafting devices frequently employed. Where the effect of such a reading is to hold in favor of a party whose position relies on language expressly eliminated from the statute, and thereby to defeat a party whose position falls squarely within the remaining language, I should have thought that we would construe the amendment in the most sensible, rather than the narrowest, manner. As the Supreme Court said in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 107 (1941), if Congress had intended any other reading of the statute, "we can hardly suppose that it would have failed to use some appropriate language to express that intention."

Finally, I think it should be pointed out that, despite the majority's illuminating instruction on the definition of receivership, and its quite proper conclusion that the liquidator did not come within that definition, we are left with the possibility that the liquidator may qualify as a trustee. At least in the jurisprudence of bankruptcy,

> "'*Trustee*' means much the same as 'receiver', the nomenclature varying in different states. *The term is*

also intended, no doubt, to include liquidating agents generally, who, though performing much the same functions as receivers, may not be appointed by a court." 1 Collier on Bankruptcy ¶ 3.502, at 501 (14th ed. 1971) (latter emphasis added).

Cf. *In re R. V. Smith Co.*, 38 F.Supp. 57, 62 (W.D. Okla. 1941).

The issue on this appeal does not lend itself to easy resolution. The approach by the majority cannot be said to be an unreasonable one. I am unwilling, however, to reach a decision on the basis of language that Congress purposefully has removed from the statute, especially in the light of analysis as persuasive as that in *In re Bonnie Classics, Inc., supra.* I therefore respectfully dissent.

APPENDIX B—Opinion of Hon. Irving Ben Cooper, United States District Court, U. S. District Court, Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER

of

BLAIR & CO., INC.,

Bankrupt.

Appearances:

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IRVING BEN COOPER, *D. J.*

The petition to review the determination of Referee in Bankruptcy, Hon. Asa S. Herzog, is denied. The Referee's order is confirmed.

In view of both the form and substance of the debentures issued, the petitioners were creditors of the bankrupt and were authorized to file a petition in bankruptcy under § 59(b) of the Bankruptcy Act, (Act) 11 U.S.C. § 95(b). New York Stock Exchange Rule 325; Cf. *Goldstein* v. *Wolfson*, 132 F.2d 624, (2d Cir. 1942).

Referee Herzog correctly determined that Blair was "insolvent" within the meaning of Section 1(19) of the Act, 11 U.S.C. § 1(19) on September 25, 1970. The conclusion was fully justified on all the evidence before him. In particular, no triable issue of fact was created as to the alleged facts contained in the balance sheet which, in our opinion, was properly considered and weighed. See *Huron Milling* v. *Hedges*, 257 F.2d 258, 262 (2d Cir. 1958); *Smith* v. *Bear*, 237 F.2d 79 (2d Cir. 1956); Fed. R. Civ. P. 56; Rule 801(d)(2), Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (March 1971); Minutes, March 11, 1971, pp. 40-41.

The appointment of the Liquidator by the New York Stock Exchange and his taking of "control" was an act of bankruptcy within the meaning of § 3(a)(5) of the Act, 11 U.S.C. § 21. We agree with the formulation of this concept by our Judge Weinfeld in *In Re Bonnie Classics*, 116 F.Supp. 646 (S.D.N.Y. 1953):

> "It is not required that the transferee of property be formally 'appointed' as trustee by a ceremonial document referring to him as such. The method adopted to effect the transfer is immaterial. It is the end result that counts. Any action by one who is insolvent which effectively causes the transfer of his property to another for final liquidation purposes appoints the transferee a trustee to take 'charge of his property' under Section 3, Sub. a(5)."

Illinois v. *Campbell*, 329 U.S. 362 (1946); see also, *In Re Hayes*, 127 F.Supp. 514 (D.C. Alaska 1955); 1 Collier on Bankruptcy §§ 3.502, 3.503, at 501-503 (14th Ed. 1971); 1 Remington on Bankruptcy § 157 at 247, § 160 at 249.

We decline to create an exemption from the Act for insolvent brokerage corporations which privately seek to wind-up their affairs pursuant to an agreement between themselves and a stock exchange. Cf. *In re Watts & Sacks*, 190 U.S. 1,27 (1902). As Referee Herzog correctly noted, such would "defeat the objectives of the Act and abort the broad powers of the court of bankruptcy intended for the uniform administration of insolvent estates" as well as "provide an effective means to defeat the exclusive jurisdiction of the bankruptcy courts by denying creditors the right to select their own trustee to effectuate liquidations." Opinion of Referee Herzog, April 13, 1971, p. 11. See *Bonnie Classics, supra*, at 648.

So ordered:

New York, N.Y.
March 15, 1972

Irving Ben Cooper
United States District Judge

APPENDIX C—Opinion of Hon. Asa S. Herzog, Referee in Bankruptcy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER

of

BLAIR & CO., INC.,

Bankrupt.

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MR. PATRICK E. SCORESE
Liquidator

Asa S. Herzog, *Referee:*

Blair & Co., Inc. ("Blair"), the bankrupt above named, is a Delaware corporation engaged in the general brokerage and commission business as a registered broker-dealer, with principal offices in New York City. It was a member of the New York Stock Exchange, American Stock Exchange, and Midwest Stock Exchange.

Prior to September 29, 1970, bankrupt was engaged in the "contraction and liquidation of its business and properties" and with the exception of a record-keeping office all of its branch offices were either closed or surrendered to other broker-dealers. The services of its registered representatives (with minor exceptions) were terminated and "efforts were undertaken" to transfer and deliver the accounts of public customers to other broker-dealers or to the customer. (Affidavit of A. George Saks, a vice-president of Blair, in support of the motion to dismiss, ¶ 6.)

On September 21, 1970, the bankrupt and its directors and voting stockholders entered into a written agreement with the New York Stock Exchange ("Exchange") whereby at their absolute discretion, the trustees of a Special Trust Fund set up by the Exchange would from time to time make loans to the bankrupt to provide direct and indirect assistance to bankrupt's customers threatened with loss of their money or securities because of bankrupt's financial condition.

Paragraph designated "VI" of said agreement provided that "from and after" the first loan or guarantee by said Trustees, or the first payment by the Trustees to any of bankrupt's creditors, is made, the Exchange shall have the right to appoint such person as it may choose as "Liquidator of the business" of the bankrupt, such Liquidator to serve until such time as all powers of attorney executed by the corporation or voting stockholders are terminated by the Exchange.

The paragraph of the said agreement designated "VIII" provides:

> "Immediately following his appointment by the Exchange, the Liquidator shall take control of the business and property of the Corporation for the purpose of liquidating the business of the corporation and shall proceed as follows in connection with the liquidation:
>
> "i) he shall promptly take such steps as he may deem practicable to reduce the Corporation's operating expenses and to dispose of the Corporation's saleable assets;
>
> . . . . .
>
> "iii) he shall, as soon as practicable, assert and collect or settle all claims and rights of the Corporation;
>
> "iv) he shall pay any claim against the Corporation considered by him to be a valid claim of any customer of the Corporation;
>
> "v) he shall take such other steps as he deems necessary and appropriate to liquidate the business of the Corporation;
>
> "It is agreed that consistent with the duty of the Liquidator to effect a fair and orderly liquidation of the business of the Corporation to enable prompt settlement with its customers, the Liquidator shall act in accordance with what he deems to be good business practice."

Pursuant to the aforesaid agreement and on September 25, 1970, the Exchange appointed Mr. Patrick E. Scorese as Liquidator (Saks affidavit, ¶ 7) and he entered upon his duties in accordance with the terms and provisions of said agreement. The Liquidator, Mr. Scorese, is one of the moving parties herein.

On September 29, 1970, four days after appointment of the Liquidator as aforesaid, an involuntary petition was

filed against Blair by J. P. Foley & Company, Inc., John P. Foley, Jr., and Anita Salisbury. Mr. Foley is principal of J. P. Foley & Company, Inc., and apparently Anita Salisbury is Mr. Foley's secretary.

The involuntary petition alleged three acts of bankruptcy [Bankr. Act § 3a, 11 U.S.C. § 21a], as follows:

> "Within four months next preceding the filing of this petition, the alleged bankrupt committed an act of bankruptcy in that the alleged bankrupt did heretofore,
>
> "(a) on or about the 10th day of August, 1970, with intent to hinder, delay and defraud its creditors, convey, transfer, conceal, remove, or permit to be concealed or removed, or set over unto said divers persons, whose names are unknown to your petitioners, valuable property, consisting of a management contract of the Blair Fund of the value of $1,000,000.
>
> "(b) while insolvent transfer property and various moneys amounting in the aggregate to the value or sum of $ to various creditors with intent thereby to prefer such creditors over other creditors of the same class, the names of the creditors receiving such preference being unknown to your petitioners.
>
> • • • • •
>
> "(f) while insolvent and unable to pay its debts as they mature, procure, permit, or suffer voluntarily or involuntarily the appointment of Patrick E. Scorese as Receiver (or Liquidator) of the assets of the alleged bankrupt and said Receiver (or Liquidator) was put in charge of the property of the alleged bankrupt on the 28th day of September 1970."

The bankrupt, Blair, interposed an answer to the involuntary petition in bankruptcy denying the material alle-

gations thereof and made written demand for trial by jury. [Bankr. Act § 19; 11 U.S.C. § 42]

Thereafter the Liquidator, Mr. Scorese, and the bankrupt, Blair, moved, pursuant to Fed.R.Civ.P. 56, for summary judgment dismissing the involuntary petition. The petitioning creditors opposed the motion, and cross-moved for summary judgment adjudicating Blair a bankrupt.

By notice of motion dated October 30, 1970, the petitioning creditors moved to amend the second act of bankruptcy alleged in the said involuntary petition by inserting the figure $5,000,000. in the blank space appearing in the allegation of said act of bankruptcy.

By notice of motion dated October 27, 1970, petitioning creditors moved for an order, pursuant to Sections 3d and 21a of the Bankruptcy Act, requiring the bankrupt to appear for deposition upon oral examination and requiring the bankrupt and the Liquidator to produce at said examination books and records relating to the issues presented by the petition and answer.*

By order of Chief Judge Sidney Sugarman, dated February 2, 1971, the aforesaid motions were referred to the undersigned for hearing and determination.

The motion for summary judgment dismissing the involuntary petition will be considered first. The moving parties argue first, that no act of bankruptcy was committed upon which an involuntary petition can be predicated, and second, that the petitioning creditors are in fact investors and not creditors, and consequently, ineligible to file the said petition.

The first act of bankruptcy charged in the transfer (with intent to hinder, delay and defraud creditors) of "valuable property" consisting of a management contract of the Blair Fund of the value of $1,000,000.

The Saks affidavit states that Blair was not a party to the management contract with Blair Fund, a publicly

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* In view of the disposition of the motion and cross-motion for summary judgment, this motion is rendered moot.

owned mutual fund. This contract, it is averred, is or was an asset of Blair Advisory Co., Inc., a Delaware corporation and subsidiary of the bankrupt. Furthermore, it is alleged, due to action of the Board of Directors of Blair Fund, a proposed sale of the capital stock of Blair Advisory Co., Inc. was never effected, and the latter company remained the owner of the management contract referred to in the alleged act of bankruptcy. (Saks affidavit, §§ 12-14 inclusive.)

The foregoing is not controverted by the petitioning creditors and as a matter of fact, on the argument before me counsel for the petitioning creditors indicated no reliance upon this alleged act of bankruptcy to sustain the petition (SMP 44).

Nor did counsel lean heavily on the second act alleged. The allegation of preferential transfers is in the barest language of the statute and susceptible to a motion to strike. Indeed, the allegation is so barren of facts that it does not lend itself to amendment. It fails to name the recipients of the transfers, it does not specify the subject matter of the transfer, except that it was "property and various moneys," and it neglects to state the value or sum of the property and money transferred. There is simply nothing to amend. It is so colorless that amendment would not be an amplification, but a replacement. This is clearly distinguishable from *Glint Factors* v. *Schnapp*, 126 F.2d 207 (2d Cir. 1942) in which it was charged that transfers were made to "relatives" of a sum exceeding $2,300. An amendment would necessarily have to invoke the relation back doctrine in order to fall within the four-month period during which otherwise innocuous preferences become acts of bankruptcy. The lack of any descriptive detail to show that a particular transfer was charged or even intended, makes the relation back doctrine utterly inapplicable in this case, *Divorsky* v. *Alanjay Bias Binding Corp.*, 182 F.2d 809 (2d Cir. 1950), and therefore it would be impossible to allege as an act of bankruptcy a preferential transfer that could withstand attack.

Accordingly, the motion to amend is denied and the second act of bankruptcy alleged in the petition is found insufficient in law.

The third act of bankruptcy alleged, the appointment of the Liquidator, however, falls squarely within Bankruptcy Act § 3a(5) [11 U.S.C. § 21a(5)] and must survive bankrupt's attack.

Bankr. Act § 3a provides that acts of bankruptcy by a person shalll consist of his having

> "(5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily, or involuntarily, the appointment of a receiver or trustee to take charge of his property;"

The bankrupt and Liquidator argue that the type of receiver or trustee referred to in § 3a(5) of the Act is one who is judicially appointed or is appointed in accordance with the provisions of statutory law. I am unable to agree that taking control by the Liquidator is not taking "charge" of the bankrupt's property within the meaning of § 3a(5) and I reject that argument.

> "It is not required that the transferee of property be formally 'appointed' as trustee by a ceremonial document referring to him as such. The method adopted to effect the transfer is immaterial. It is the end result that counts. Any action by one who is insolvent which effectively causes the transfer of his property to another for final liquidation purposes appoints the transferee a trustee to take 'charge of his property' under Section 3, Sub. a(5)." *In re Bonnie Classics*, 116 F.Supp. 646 (S.D.N.Y. 1953).

The Liquidator, Mr. Scorese, took "control of the business and property" of the bankrupt for the express purpose of liquidating it with power to take such "steps as he deems necessary and appropriate to liquidate the business"

of the bankrupt. He is empowered to "dispose of the Corporation's saleable assets." He is authorized to "collect and settle all claims" and pay what he considers valid claims of any customer of the bankrupt.

As I construe the agreement of September 21, 1970, under which Mr. Scorese was designated as Liquidator, he had exclusive possession and control of bankrupt's assets at all times after he took charge. The powers he was authorized to exercise were not less than those of a court-appointed receiver or trustee. He exercised complete dominion and his possession divested the officers and directors of Blair of possession and control of the company's assets. His duty was to proceed to liquidate and wind up the affairs of the bankrupt and to distribute its assets to those entitled thereto.

Any other view of the role of the Liquidator in this case would provide a convenient way to exclude insolvent corporations from the scope of the Bankruptcy Act through winding-up proceedings worked out privately between a broker and the Stock Exchange. Cf. *In re Watts & Sacks*, 190 U.S. 1, 27. Any other construction would defeat the objectives of the Act and abort the broad powers of the court of bankruptcy intended for the uniform administration of insolvent estates. Were I to uphold Blair's and the Liquidator's contention, it could provide an effective means to defeat the exclusive jurisdiction of the bankruptcy courts and deny creditors the right to select their own trustee to effect liquidation.

> "It would provide a neat way for derelict directors to gain immunity from investigative and discovery techniques and summary procedures set up under the Act. It would deprive creditors of the comprehensive powers under the Act aimed at the expeditious recovery of assets which may have been diverted or transferred from an insolvent estate." *In re Bonnie Classics*, 116 F. Supp. 646, *supra*.

I hold that the taking of "control" by the Liquidator was an act of bankruptcy within the meaning of § 3a(5) of the Bankruptcy Act.

The second contention of the bankrupt and of the Liquidator is that the petitioning creditors are not in fact creditors and are therefore ineligible to act as petitioning creditors.

The Saks affidavit avers that on April 3, 1970, John P. Foley, Jr., acting for himself, the other petitioning creditors, and Anne A. Foley, entered into an agreement with Blair, pursuant to which each made "investments" in Blair which were "characterized as subordinated loans." (Saks affidavit §§ 34, 35)

It is the nature of this transaction which gave rise to the unique situation now presented. Foley executed a "collateral agreement" and secured note in the sum of $3,784,349, both dated April 3, 1970. The secured note was collaterized by marketable securities, pledged concurrently with the execution of the note. The general scheme of the transaction, reduced to its simplest terms, was this: if Blair's call for payment on the note was met, Blair would issue to Foley a subordinated debenture in like amount; on the other hand, if Blair's call for payment went unheeded, Blair could liquidate the collateral [¶ XI(b) of the Collateral Agreement] and issue the subordinated debenture (¶ IX of said Agreement). This is precisely what occurred and this transaction is what gave rise to the relationship between the parties which bankrupt said made Foley an investor and which Foley says made him a creditor, albeit a subordinated creditor.

The question which presents itself is why this roundabout and rather complicated method, if an investment was intended? Or indeed, why this method of making a loan, if that was the intention of the parties?

The answer, it seems clear to me, is found in the Rules & Policies to the Stock Exchange governing the operation of member organizations, and particularly, those rules

applying to capital requirements. In Rule 325 (referred to in paragraph III(b) of the Collateral Agreement), the Exchange has fixed the capital requirements of its member firms and in effect has set a minimum ratio of capital to debt. It provides that for the purpose of computing the net capital of member firms there may be included "borrowings covered by subordination agreements approved by the Exchange." (Rule 325.15) In practice, therefore, the member firm needing capital borrows money to use as part of its capital requirement under an agreement to repay with interest and a percentage of net income to compensate for the risk involved in subordinating.

The reason for the secured note is that although the member firm has need to have its capital bolstered by the securities behind the note, it has, or may at the moment have, no need for cash. The collateral agreement, therefore, is in effect a commitment to lend money, or if it does not have the money when demand is made, to permit the securities to be converted into cash.

Rule 325.30 permits subordinated liabilities to be shown in a separate section on the liability side of its statement following current liabilities and preceding net worth or capital. It permits such liabilities to be shown, for example, as follows:

"Subordinated Liabilities and Capital:

Liabilities subordinated to claims of general creditors	$.....
Capital (net worth or other acceptable title)	$.....

This practice does not mask the true liabilities of the company as will be shown when the solvency of Blair is discussed, *infra*.

In any event, Rule 325 of the Exchange explains, certainly to my satisfaction, why what was undoubtedly a loan by the petitioning creditors to Blair, became a more or

less complicated and certainly out-of-the-ordinary transaction.

But what emerges from the Collateral Agreement, the secured note and the pledged securities, was a loan to Blair now evidenced by debentures and the debtor-creditor relationship.

The term "debenture" hardly needs a dictionary definition. But, according to Black's Law Dictionary (3d ed.), it consists of any instrument which either creates or agrees to create a debt in favor of one person or corporation, or several persons or corporations, or acknowledges such a debt. Debentures are nothing more than notes representing indebtedness, not ordinarily secured. 6a *Fletcher Cyclopedia Corporations* (1968 ed.) § 3635. A debenture is simply an unsecured promissory note. *G.M.A.C.* v. *Higgins*, 161 F.2d 593 (2d Cir. 1947), *cert. denied*, 332 U.S. 810 (1947).

An examination of the subordinated debenture here shows all the characteristics and earmarks of a subordinated promissory note.

Firstly, there is the fixed interest rate: the prime rate of interest in New York City, but not less than 6% per annum, payable semi-annually on fixed dates. It is common knowledge that it is not at all unusual to have interest rates keyed to the prime rate. The provision for a contingent additional return of not more than 2% per annum if net income for such purpose is available is again not unusual, and, as hereinabove indicated, serves as a compensation for the risk of subordinating the loan to other creditors.

Secondly, there is a fixed maturity date, the holder having the right to demand payment on the principal in full (or in multiples of $1,000.) two and one half years after April, 1970, or on any date thereafter on thirty days written notice. Of course, payment may be made only if the corporation is solvent, a condition to be expected since

the debenture is subordinated and subject to prior payment in full of other creditors not so subordinated.

Thirdly, there is provision for acceleration upon default in payment of principal, insolvency, commission of an act of bankruptcy, general assignment for the benefit of creditors or appointment of a receiver for all or a substantial part of the corporation's property.

Finally, throughout the debenture and the Collateral Agreement language is used which expresses the relationship of the parties in terms of a creditor-debtor situation. The debenture does not contain convertible features and thus the question of whether or not it can be held to be an "equity security" simply does not arise in this instance. Cf. *Chemical Fund, Inc.* v. *Xerox Corp.*, 377 F.2d 107, 110 2d Cir. 1967).

I hold as a matter of law that the petitioning creditors were not capital investors but were creditors who loaned money to Blair for which they received the subordinated debentures.

The bankrupt and the Liquidator cite, in support of their contention, cases determined by the tax court but I do find these to be inapposite. The purpose of the inquiry in the tax cases frequently differs from the purpose of the inquiry in bankruptcy. The Tax Courts are faced with situations where so-called advances are in reality contributions to capital, and therefore, not bona fide debts which may be taken as tax losses.

The bankruptcy situation is entirely different. The circumstances of loans to a company which subsequently becomes bankrupt, may result in their being *treated* as capital investments for the purpose of subordinating them to the claims of other creditors, but they are none-the-less treated as creditors entitled to participate in dividends in the event other creditors are paid in full.

But a creditor who subordinates his claim to those of other creditors does not cease to be a creditor, *Goldstein* v. *Wolfson*, 132 F.2d 624 (2d Cir. 1942), and I know of no

case, nor has one been cited to me, which holds that a subordinated creditor cannot be a petitioning creditor.

In re Itemlab, Inc., 197 F.Supp. 194 (E.D.N.Y. 1961) (reversed on other grounds, 353 2d 149) cited by bankrupt does not bolster its petition, merely holding that the subordinated creditor is not entitled to vote his claim on the question of acceptance of an arrangement since it "would repose in the inferior creditor the power to use his vote to determine how the superior creditor shall collect a claim in which the inferior creditor no longer has an interest." There is obviously distinction between the issue decided in *Itemlab* and that presented in the case *sub judice*. It is one thin gto say that a subordinated creditor may not vote his claim in a Chapter XI proceeding, and quite another to say that by reason of subordination of their claims creditors are disqualified from acting as petitioning creditors.

Section 59b of the Act (11 U.S.C. § 95b) says that three or more creditors holding provable claims not contingent as a liability against a person, amounting in the aggregate to $500. in excess of the value of any securities held by them, may file a petition to have him adjudged a bankrupt.

Provable claims are set forth in § 63a of the Act (11 U.S.C. § 103) which provides:

> "a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by . . . an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not . . . ."

It seems perfectly clear to me that the petitioning creditors have provable claims which entitled them to file the involuntary petition in bankruptcy.

The bankrupt makes what I deem a specious argument to the effect that since it has not yet been ascertained that Blair is unable to pay all its liabilities, it cannot be stated at this juncture that petitioners have suffered any loss. It is conceivable, so the argument runs, that liquidation may

result in the satisfaction of all creditors' claims, including those of the "so-called subordinated lenders." Ergo, it is concluded, the claims of the petitioning creditors are contingent and they do not qualify as petitioning creditors.

This is to fly in the face of all reality. The voluntary liquidation of Blair, the intervention of the Stock Exchange, and the making available of the Exchange's Special Trust Fund to assist in making customers whole all bespeak an insolvency which reduces the likelihood of the subordinated debenture holders realizing any significant amount of their claims to such an extent that it cannot be given any weight. Moreover, as will be indicated, *infra*, Blair was and is seriously and grossly insolvent and not by any fiction can the claims of the petitioning creditors be said to be contingent.

I conclude, therefore, that the petitioning creditors are qualified to file the involuntary petition herein within the meaning of Section 59b of the Act. I have found that an act of bankruptcy has been properly alleged within the meaning of § 3a(5) of the Act. Accordingly, the motion for summary judgment dismissing the involuntary petition is denied.

I turn now to the cross-motion for summary judgment adjudging Blair a bankrupt.

The facts constituting the fifth act of bankruptcy under § 3a of the Act are not denied. Mr. Scorese was, with the consent of the bankrupt, and within the prescribed four-months period, put in charge of its property and his duties and powers are set forth in the exhibits attached to the moving papers. The only question left is whether Blair was insolvent at the time, as required by § 3a(5). I hold that it was.

Attached to the cross-motion is Exhibit I consisting of a balance sheet of Blair as of June 30, 1970, two months and twenty-one days before the appointment of the Liquidator. The accuracy of this statement is not challenged. It indicates assets of $82,290,980.75. It indicates liabilities as follows:

"TOTAL CURRENT LIABILITIES		$ 72,259,737.78
CAPITAL AND SUBORDINATED BORROWING:		
Subordinated borrowings		
Debentures	$ 13,937,819.00	
Secured Demand Notes	6,320,128.00	
		20,257,947.00
Capital Stock and Surplus (deficit)		10,226,704.03
Total		10,031,242.97
TOTAL LIABILITIES & CAPITAL		$ 82,290,980.75"

It is instantly apparent that in accordance with Rule 325 of the Exchange, discussed *supra*, $20,257,947.00 has been set up in a separate category together with capital, which may create the illusion that Blair's assets exceed liabilities by $10,000,000.

This may be perfectly legitimate and sound accounting practice, but the Bankruptcy Court is not bound by the Rules of the Stock Exchange nor by the accounting practices it countenances.

Bankruptcy Act § 1(19) provides:

> "A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of its property, exclusive of any property which he may have conveyed, transferred, concealed, removed or permitted to be concealed or removed, shall not at a fair valuation be sufficient in amount to pay his debts;"

This clear-cut definition cannot be defeated by an accounting practice which places subordinated borrowings and secured demande notes in the same category with capital. Indeed, the financial statement itself recognizes the debentures as "borrowings," albeit subordinated. Applying the bankrutcy definition it appears uncontroverted that on June 30, 1970, Blair's liabilities exceeded its assets

by $10,000,000. The situation, if not worsened on September 21, 1970, when the Liquidator was appointed, and on September 29, 1970, when the involuntary petition was filed, was at the very best, unchanged. Certainly, nothing which would lead to a contrary conclusion appears in the papers on the motions and the exhibits annexed thereto.

Accordingly, I conclude as a matter of law that the bankrupt was insolvent within the bankruptcy definition when the act of bankruptcy was committed and when the petition was filed.

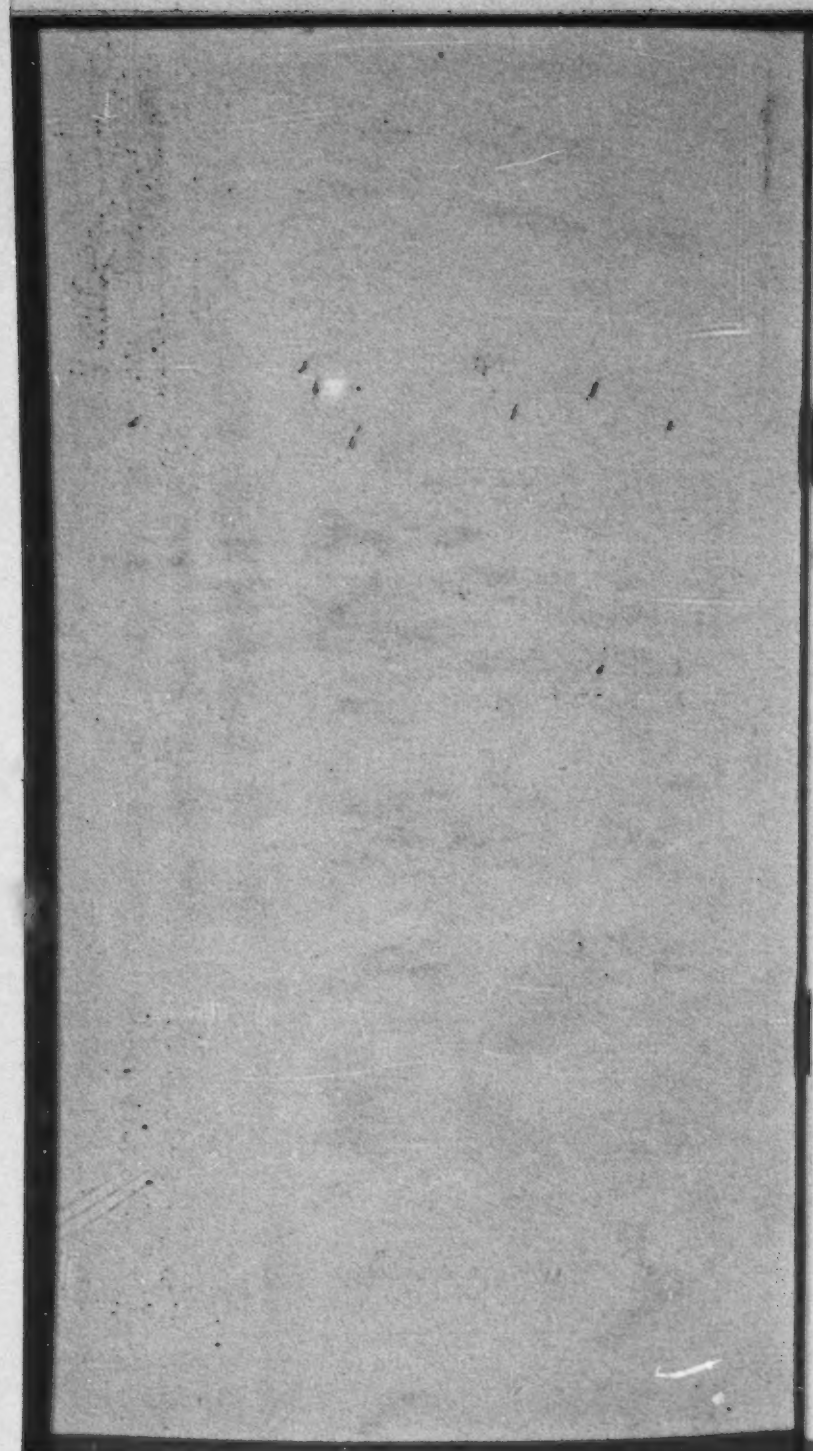
It appears that within the four-month period and while insolvent, the bankrupt committed the fifth act of bankruptcy; that it was insolvent when the involuntary petition in bankruptcy was filed; and that the petitioning creditors are not disqualified from acting as petitioning creditors. Accordingly, there is no genuine issue as to any material fact to be tried. The petitioning creditors are entitled to summary judgment as a matter of law decreeing that Blair be adjudged a bankrupt.

Settle order upon three days' notice in conformity with the foregoing.

Dated: New York, New York, April 13, 1971.

.....

REFEREE IN BANKRUPTCY



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1154

In the Matter

of

BLAIR & CO., INC.,

Debtor.

JOHN P. FOLEY, JR., J. P. FOLEY & CO., INC. and ANITA SALISBURY,

Petitioners,

against

BLAIR & CO., INC. and PATRICK E. SCORESE, as Liquidator appointed by the New York Stock Exchange, Inc. for BLAIR & CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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In the Matter

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JOHN P. FOLEY, JR., J. P. FOLEY & CO., INC. and ANITA SALISBURY,

Petitioners,

against

BLAIR & CO., INC. and PATRICK E. SCORESE, as Liquidator appointed by the New York Stock Exchange, Inc. for BLAIR & CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Question Presented

Is the appointment of an agent to liquidate property, who is not vested with title to the property and whose appointment does not affect the rights of creditors, the commission of an act of bankruptcy under Section 3a(5) of the Bankruptcy Act, 11 U.S.C. §21a(5)?

Opinions and Orders Below

John P. Foley, Jr., J. P. Foley & Co., Inc. and Anita Salisbury (hereinafter collectively "Foley" or "Petitioners") seek the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit ("Court of Appeals") from the opinion and order of that court dated December 11, 1972 (Pet. App. "A" at 10).* The opinion and order of the Court of Appeals, not yet officially reported, reversed an order of the United States District Court for the Southern District of New York ("District Court"), dated March 15, 1972 (Pet. App. "B" at 25), which had confirmed an order of a referee in bankruptcy. The order of the referee sustained an involuntary petition in bankruptcy against Blair & Co., Inc. ("Blair") on the ground that a liquidating agent was the equivalent of a "receiver" or "trustee" within the context of Section 3a(5) of the Bankruptcy Act, *supra* (Pet. App. "C" at 28).

The Court of Appeals, in the majority opinion of Chief Judge Henry J. Friendly, held that, in view of the legislative history of the Bankruptcy Act, an agent appointed to liquidate was not a "receiver" or "trustee" under Section 3a(5) of the Act.

Jurisdiction

The jurisdiction of this Court is apparently invoked by Petitioners under Section 24c of the Bankruptcy Act, 11 U.S.C. § 47c, although the petition for certiorari does not so indicate.

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* References in parentheses followed by "Pet. App." refer to Appendices "A", "B" or "C" to the petition for certiorari herein and the pages thereof.

Statute Involved

The instant petition is concerned only with the commission of an act of bankruptcy under Section 3a of the Bankruptcy Act, 11 U.S.C. § 21a. In prosecuting their involuntary petition in bankruptcy, Petitioners relied upon only one alleged act of bankruptcy. The pertinent statutory provision involved in connection therewith is Section 3a(5) of the Act, *supra*, which states, in relevant part, as follows:

> "Acts of bankruptcy by a person shall consist of his having . . . (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property. . . ."

Statement of the Case

The relevant and salient facts pertaining to the petition at bar are as follows:

1. Prior to September 21, 1970, Blair was engaged in the general brokerage and commission business, maintaining its principal place of business at 20 Broad Street, New York, New York. It was a registered broker-dealer and a member of the New York Stock Exchange ("Exchange") and other national securities exchanges (Pet. App. "A" at 11).

2. On or about April 3, 1970, Foley contributed to Blair a secured demand note collateralized by marketable securities in order to increase Blair's capital (93A-98A).* Foley's

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* Numbers in parentheses followed by "A" refer to pages of the joint appendix filed by the parties with the Court of Appeals.

right to the return or withdrawal of the moneys and securities contributed to Blair was subordinated to the rights of all public customers and other creditors who had not also subordinated their rights and claims (Pet. App. "A" at 12).

3. In the early summer of 1970, Blair commenced a program of self-liquidation which involved the transfer of its customer accounts to other brokers or dealers and the delivery of securities as designated by customers. For the purposes of expediting the satisfaction of public customers' claims and to provide customer assistance, if necessary, Blair entered into an agreement with the Exchange on September 21, 1970. That agreement provided, *inter alia*, that the Exchange would have the right to appoint a "Liquidator" in the event that the trustees of the Exchange's Special Trust Fund made a loan to or guaranteed any obligation of Blair (32A-63A).

4. The Exchange's Special Trust Fund was established in 1964 to (a) provide public customer assistance, where appropriate, in the case of a financially distressed member organization and thus alleviate the hardship which might otherwise be incurred by public customers if such member organization became involved in a bankruptcy proceeding; and to (b) avoid a loss of confidence on the part of public customers in the securities market (Pet. App. "A" at 12).

5. On September 25, 1970, the trustees of the Special Trust Fund made an initial advance to Blair. Pursuant to the terms of the agreement dated September 21, 1970, the Exchange appointed Patrick E. Scorese as Liquidator for Blair. Mr. Scorese was appointed for the purpose of assisting Blair's public customers through the use of advances

from the Special Trust Fund and to implement the program of liquidation previously adopted by Blair's management. The Liquidator was given authority and power by Blair's board of directors to act for and on behalf of Blair in connection with its assets and properties (46A-63A).

6. On September 29, 1970, Foley filed with the District Court an involuntary petition in bankruptcy against Blair (Pet. App. "A" at 13).

7. At the time of the filing of the involuntary petition in bankruptcy, Blair had approximately 28,000 customer accounts and held more than $75,000,000 in securities, approximately $40,000,000 of which, including those of customers, were pledged with banks as collateral for loans approximating $30,000,000 (Pet. App. "A" at 11).

8. All advances from the Special Trust Fund to Blair ceased upon the filing of the involuntary petition in bankruptcy (Pet. App. "A" at 13).

9. Blair interposed an answer to the involuntary petition in bankruptcy on October 9, 1970, which denied the material allegations thereof and contained an application for a trial by jury pursuant to Section 19 of the Bankruptcy Act, 11 U.S.C. §42. Thereafter, Blair moved in the bankruptcy court for summary judgment dismissing the petition and Foley cross-moved for summary judgment adjudging Blair a bankrupt (Pet. App. "A" at 13).

10. By decision dated April 13, 1971, the referee in bankruptcy denied Blair's motion, granted the cross-motion and held, in part, that Blair's consent to the appointment of

Mr. Seoresc constituted the commission of the fifth act of bankruptcy under Section 3 of the Act (Pet. App. "C" at 28). On April 15, 1971, Blair filed a petition for an arrangement under Chapter XI, Section 321 of the Bankruptcy Act, 11 U.S.C. §721. As a consequence, the referee's order adjudging Blair a bankrupt (234A-235A), dated April 27, 1971, stayed all proceedings thereon subject to the further order of the referee assigned to the Chapter XI proceedings.

11. On May 7, 1971, a petition for review of the referee's order of April 27, 1971 was filed in accordance with Section 39c of the Bankruptcy Act, 11 U.S.C. §67 (229A-236A).

12. By opinion and order dated March 15, 1972, District Judge Irving Ben Cooper confirmed the order of the referee in bankruptcy (Pet. App. "B" at 25).

13. On December 11, 1972, the Court of Appeals reversed the order of the District Court with instructions to direct the referee to vacate the order of adjudication and dismiss the involuntary petition in bankruptcy (Pet. App. "A" at 22). The Court of Appeals found that the referee and the District Judge "erred in concluding that Blair had committed the fifth act of bankruptcy" (Pet. App. "A" at 14).

ARGUMENT

I.

A Liquidating Agent Is Not a "Receiver" or "Trustee" Within the Meaning of Section 3a(5) of the Bankruptcy Act.

Foley argues in the petition for certiorari that because Blair gave the Liquidator broad powers, the Court of Appeals "indulge[d] in meaningless semantics, and . . . consider[ed] form greater than substance" when it distinguished a consensually appointed liquidating agent from a receiver or trustee (Pet. at 8).* To support this contention, Foley relies upon the opinions of the referee in bankruptcy (Pet. App. "C") and the District Judge (Pet. App. "B") that "any difference between a Court-appointed Receiver and a privately selected liquidator did not warrant a distinction in the legal effect thereof, insofar as each constitutes an act of bankruptcy within the intent of §3(a)(5) [sic]." Neither the District Judge nor the referee cited any authority for that proposition. Moreover, neither the District Judge nor the referee analyzed the legal meaning and significance of the terms "receiver" and "trustee", as did the Court of Appeals.

The court below correctly determined that the Liquidator did not meet the usual requirements "essential to the status of a receiver, namely, appointment by a court" (Pet. App. "A" at 15). While Foley disregards such a distinction, it is undisputed that the Liquidator was consensually appointed

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* References in parentheses to "Pet." refer to pages of the petition for certiorari.

and *not* appointed by a court. As this Court noted in *Booth* v. *Clark*, 58 U.S. (17 How.) 322, 331 (1855),

> "A receiver is an indifferent person between parties, *appointed by the court* to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. [Citations omitted]. *He is an officer of the court;* his appointment is provisional. . . . The money in his hands is in *custodia legis* for whoever can make out a title to it. [Citations omitted.] *It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as conferred upon him by the order of his appointment and the course and practice of the court.*" [Emphasis supplied.]

Accord, High, A Treatise on the Law of Receivers, ch. 1, §1, at 2-3 (4th ed. 1910).

Foley's petition for certiorari also ignores the established principle that a receiver "is the agent only of the court appointing him." *Ledbetter* v. *Farmers Bank & Trust Co.*, 142 F. 2d 147, 150 (4th Cir. 1944). In the *Ledbetter* case, *supra*, the plaintiffs contended that a receiver appointed by a state court in a mortgage foreclosure proceeding acted as the agent and representative of the mortgagees in wrongfully dealing with the receivership property. Affirming the lower court's dismissal of the complaint, the Court of Appeals for the Fourth Circuit held that the receiver was not the agent of the mortgagees, but was the agent only of the court which had appointed him, reasoning as follows:

> *"It is well recognized that a receiver is the agent only of the court appointing him; he represents the court rather than the parties. He is custodian of*

property which is under the control of the court. See 23 R.C.L.—Receivers §2, p. 7. The appointment of a receiver is a judicial act. It is not a matter of positive right, but rests in the sound legal discretion of the appointing judge. Suggestions as to the person to be appointed as receiver do not have the legal effect of making the receiver the agent of the party making the suggestion. Citations omitted.] [The court then quoted this Court's definition of 'receiver' quoted above in *Booth* v. *Clark, supra.*] Though a receiver appointed by the court acts for all parties interested, he is not the agent of the parties in the sense that each or any of the parties is responsible for his acts. . . ." 142 F. 2d at 150. [Emphasis supplied.]

Therefore, the Court of Appeals was correct in reasoning that, since a receiver is not, without more, an agent, so an agent with broad powers such as the Liquidator, is not, without more, a receiver (Pet. App. "A" at 16). The Liquidator was not court-appointed and consequently cannot be deemed an officer of any court, for, as the Court of Appeals correctly noted, Blair executed an instrument on September 21, 1970 which described the Liquidator as "the true and lawful attorney and agent of and for [Blair]." (Pet. App. "A" at 13).

Similarly, the court below correctly held that the Liquidator lacked one element essential to the normal concept of trusteeship, namely, legal title to the property of Blair (Pet. App. "A" at 16).

> "An agent does not ordinarily have title to the property of the principal, although he may be entrusted with possession and although he may have power to pass title; *but a trustee has title to the trust property.*" [Emphasis supplied.]

Scott, The Law of Trusts, ch. 1, §8, at 78-79 (3rd ed. 1967); see *Handy* v. *C.I.T. Corp.*, 291 Mass. 157, 197 N.E. 64 (1935); Restatement of Trusts 2d, §§ 2 and 8 & comment *a.* (1959).

This Court has also stated that

> "[a] trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another." *Taylor* v. *Davis' Adm'x.*, 110 U.S. 330, 334 (1884).

While the Liquidator, as Blair's agent, could subject Blair to liability for his acts, a trustee would ordinarily not have such power. *Scott*, The Law of Trusts, ch. 1, § 8, at 74 (3rd ed. 1967). Foley has not, and indeed cannot, point to any document which vested the Liquidator with title or any other interest in the property of Blair.

Relying only upon *In re R. V. Smith Co.*, 38 F. Supp. 57 (W.D. Okla. 1941), Foley contends that the decision of the Court of Appeals "is a distinct and abrupt departure from everything that has been written on the question involved on this appeal" (Pet. at 6). In fact, the issue of whether an insolvent debtor's consent to the appointment of a non-statutory, non-court appointed liquidating agent constitutes the commission of the fifth act of bankruptcy has not been squarely dealt with by any court, although the court in the *Smith* case, *supra*, did treat the subject obliquely. There, the petitioning creditors alleged that the debtor's consent to the appointment of "liquidating trustees" constituted an assignment for the benefit of credi-

tors, the fourth act of bankruptcy. Section 3a(4) of the Bankruptcy Act, 11 U.S.C. §21a(4). The court stated initially it was "not at all satisfied that even under the Act and under the construction that has been placed on similar acts by Federal Courts, the instruments executed . . . did not constitute an assignment for the benefit of creditors," even though title was not expressly conveyed to the liquidating trustees. 38 F. Supp. at 62. But see *In re Ambrose Matthews & Co.*, 229 Fed. 309 (D.N.J. 1916), *aff'd* 236 Fed. 539 (3d Cir. 1916). While the court in the *Smith* case merely stated that the alleged bankrupt had committed the fifth act of bankruptcy, it did not indicate whether or not any defense was interposed to the alleged commission of such act. Moreover, the court gave no consideration whatsoever to the derivation of Section 3a(5) or the legislative intent underlying the adoption of that section. Consequently, it is submitted, and the Court of Appeals found, that the reasoning of the *Smith* case, *supra*, is not at all persuasive (Pet. App. "A" at 17). In any event, the *Smith* decision was not binding on the Court of Appeals and has not been cited for any purpose in a reported opinion during the thirty years since it was rendered.

As with the fourth act of bankruptcy, the debtor's making of a general assignment for the benefit of his creditors, the fifth act of bankruptcy has the effect of preventing creditors from pursuing their ordinary remedies against the debtor. When either the fourth or fifth acts of bankruptcy are committed, creditors have to deal with the debtor's assignee, receiver or trustee. In contrast, after the appointment of the Liquidator, Blair's creditors could have proceeded against the debtor's property and assets to enforce any judgments which they might have obtained. Further,

Blair's creditors would have the right to prosecute their claims in the court of their own choosing, a valuable right to such creditors, most of whom are spread throughout the country. Finally, unlike the ordinary assignment, receivership or trusteeship contemplated by the fourth and fifth acts of bankruptcy, Blair's creditors would not be relegated to a pro rata distribution of the debtor's assets in a formal proceeding.

As the court below correctly noted, Congress determined that an insolvent debtor's placing of such obstacles as an assignment for the benefit of creditors, receivership or trusteeship in the way of his creditors should enable those creditors to choose their own trustee in a formal bankruptcy proceeding. See *Globe Ins. Co.* v. *Cleveland Ins. Co.*, 10 Fed. Cas. 488, 492 (No. 5486) (C.C.N.D. Ohio 1876) *appeal dismissed*, 98 U.S. 366 (1879).

A corporate debtor which merely grants a power of attorney for the purpose of winding up its affairs has not made an assignment for the benefit of its creditors, and has thus not committed the fourth act of bankruptcy. *In re Ambrose Matthews & Co.*, 229 F. 309 (D.N.J. 1916), *aff'd* 236 F. 539 (3d Cir. 1916). As the court reasoned in *Ambrose Matthews, supra*,

> "It is necessary primarily, therefore, to construe this instrument [i.e. the power of attorney] and to ascertain its legal effect as respects the property of the alleged bankrupt. It does not contain any words of conveyance, assignment or transfer. It merely appoints two persons as 'agents, attorneys and trustees' for the stockholders, directors and corporation 'for the purpose of winding up the affairs' of the corporation. It empowers them to collect the corporation's outstanding accounts, to pay its debts, to prosecute

and defend suits for and against it, to convey and dispose of its property, and after payment of its debts to divide its assets among the stockholders; also, to prepare the necessary papers for the dissolution of the corporation immediately after its accounts have been settled; and, generally, it sought in terms to confer upon them all of the powers and to impose all of the liabilities of a board of directors in winding up the affairs of a corporation upon dissolution. It seems entirely clear that it conferred no title whatever to any of the corporation's property upon the trustees. Its effect was merely to clothe the trustees with certain powers regarding the disposition of the corporation's assets and the distribution of the same among its creditors and stockholders. Nor can I find that there was any intent on the part of the alleged bankrupt to confer title upon the trustees. Each of the latter were attorneys at law, and the purpose of the instrument was that they, who were presumably better qualified, rather than the directors, should wind up the affairs of the corporation. *As the instrument brought about no change in the title to the property, either absolute or conditional, nothing was conveyed or transferred by it, and it could not hinder, delay or defraud creditors, because any creditor could proceed to satisfy his claim from the corporation's property to the same extent as though the instrument did not exist.*" 229 F. at 310. [Emphasis supplied.]

The reasoning of the foregoing decision is directly applicable to the case on appeal, for if the debtor's granting of such a power of attorney does not constitute the fourth act of bankruptcy, then it should not constitute the fifth act, particularly when the rights of creditors are in no way affected thereby. Accordingly, the court below was entirely correct in holding that the Liquidator was not the equivalent of a "receiver" or "trustee" within the meaning of Section 3a(5) of the Bankruptcy Act.

Similarly, Foley's reliance upon *In re Watts & Sachs*, 190 U.S. 1 (1903) is misplaced. There, this Court held that "the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up *under state statutes*." 190 U.S. at 27. [Emphasis supplied.] In *Watts & Sachs* this Court was construing the predecessor to Section 3a(5), which provided that an act of bankruptcy would exist if a person "being insolvent, applied for a receiver or trustee for his property or because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States." In fact, the receiver in that case had been appointed by a state court prior to the commencement of the bankruptcy proceedings. Since the Liquidator of Blair was not appointed pursuant to statute or any judicial proceeding, the *Watts & Sachs* decision is easily distinguishable from the case on appeal.

II.

The Legislative History and Statutory Context of Section 3a(5) of the Bankruptcy Act Establishes That an Agent Appointed to Liquidate Is Not Within the Purview of That Section.

The legislative history and statutory context of Section 3a(5) of the Bankruptcy Act do not reveal a Congressional intent to include a consensually appointed liquidating agent within the coverage of said section. Foley significantly avoids any express reference to the legislative history of said section and does not in any way refute the extensive historical analysis set forth in the opinion of the Court of Appeals (Pet. App. "A" at 17-20).

The court below noted that the present Section 3a(5) has its derivation in the Bankruptcy Act of 1898, ch. 541, §1 *et seq.*, 30 Stat. 545. In the original statute, the appointment of a receiver or trustee was not deemed to be an act of bankruptcy, but several courts nevertheless treated such an appointment as the equivalent to a general assignment for the benefit of creditors, the fourth act of bankruptcy. *Scheuer* v. *Smith & Montgomery Book & Stationery Co.*, 112 F. 407 (5th Cir. 1901). The majority of courts, however, ruled otherwise. *In re Burrell*, 123 F. 414 (2d Cir. 1903).

Because of the conflicting decisions, the fourth act of bankruptcy was amended in 1903 to provide that an act of bankruptcy was committed if the alleged bankrupt " . . . made a general assignment for the benefit of creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee had been put in charge of his property *under the laws of a State, or a Territory, or of the United States.*" Act of February 5, 1903, 32 Stat. 797. [Emphasis supplied.] Thus, the 1903 statutory amendment created a new act of bankruptcy intended to cover those cases where a receiver or trustee was appointed *pursuant to a statute or judicial proceeding.*

As the court below correctly noted (Pet. App. "A" at 18), the 1926 amendment to Section 3a was intended only to clarify the definition of the term "insolvency" contained in said section. H.R. Rep. No. 695, 69th Cong., 1st Sess. 4 (1926); H.R. Rep. No. 877, 69th Cong., 1st Sess. 7 (1926). While the 1926 amendment to the section deleted the words "under the laws of a State, of a Territory, or of the United States", the House Report and analysis of the proposed changes indicates that no substantive change was intended

to be brought about by such deletion. In fact, the Senate bill, S. 1039, retained these words, 67 Cong. Rec. 6800 (1926), but, in conference, the words were subsequently stricken, the House managers stating that the "difference consists merely in phraseology." H.R. Rep. No. 1257, 69th Cong., 1st Sess. 8 (1926). Hearings in the House of Representatives also demonstrate that the deletion of the aforesaid language was not meant to be a substantive change. See Hearings pursuant to H. Res. 353 on Revision of the Bankruptcy Law Before the House Comm. on the Judiciary, 68th Cong., 2d Sess., ser. 51, at 38-39 (1925); Hearings on H.R. 5221 and H.R. 8119 Before the House Comm. on the Judiciary, 69th Cong., 1st Sess., ser. 4, at 17 (1926).

In view of the authorities previously cited herein, there can be no doubt that the deleted language was surplusage, for a receiver would necessarily be appointed pursuant to a statute or by a court and a trustee would also be so appointed or would be an assignee for the benefit of creditors under the fourth act of bankruptcy. Moreover, if an insolvent debtor had transferred its assets to an individual otherwise than for the benefit of all its creditors, the transaction would either be a fraudulent conveyance or a preferential transfer under the first and second acts of bankruptcy.

Section 3a(5) was further amended in 1933 to read in its present form, which is not limited to the bankruptcy definition of involvency. See 1 *Collier*, Bankruptcy ¶3.501 at 496 (14th Ed. 1971). The Senate Report indicates that the purpose of the amendment was to broaden the scope of the fifth act of bankruptcy "in order to reach the widely prevalent abuse of collusive equity receiverships." S. Rep. No. 1916, 75th Cong., 3d Sess. 12 (1938); see also H.R. Rep.

No. 1409, 75th Cong., 1st Sess. 6 (1937). The collusive equity receiverships to which Congress had directed its attention involved judicially appointed receivers and *not* consensually appointed liquidating agents. See, e.g., *First National Bank* v. *Flershem*, 290 U.S. 504 (1934).

Further evidence that Congress never intended the words "receiver" or "trustee" to include a consensually appointed liquidating agent can be found by comparing Section 3a(5) with Section 2a(21) of the Bankruptcy Act, which section authorizes the bankruptcy court to "[r]equire receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property" to deliver the property in their possession or control to a representative of the bankruptcy court. Section 2a(21) was added in 1938, 52 Stat. 844, at the same time Section 3a(5) was amended. It is readily apparent, therefore, that when Congress intended to include a consensually appointed liquidating agent within a specific provision of the statute, it expressly referred to such an agent. Since Section 3a(5) contains no such reference, the inevitable conclusion is that a consensually appointed liquidating agent does not fall within the coverage of the fifth act of bankruptcy.

Congress also amended Section 69d of the Act in 1952 so as to provide that upon the filing of a petition, "a receiver or trustee, appointed in proceedings not under this Act, of any of the property of a bankrupt, an assignee for the benefit of creditors of a bankrupt, or an agent authorized to take possession of or to liquidate any of the property of a bankrupt" shall be accountable to the bankruptcy court for action taken after the filing of the petition, shall file a

schedule of assets and liabilities, shall make a sworn statement of his administration of the estate, and shall not make any disbursements or take other administrative action without authorization from the bankruptcy court. 66 Stat. 426. The 1952 amendment to Section 69d was made for the express purpose of including assignees for the benefit of creditors and liquidating agents within its coverage, as explained by the House Committee:

> "[The amendment] conforms the scope of Section 69d of the Act to that of Section 2a(21). Section 2a(21) gives the court jurisdiction to require receivers or trustees, appointed in proceedings not under the Act, as well as assignees for the benefit of creditors and agents authorized to take possession of or to liquidate a person's property, to deliver the property in their possession or under their control to a receiver or trustee appointed under the Act. Section 69d, spelling out that power, requires a receiver or trustee, not appointed under the Act, of any property of the bankrupt, to account to the bankruptcy court, *but does not include the assignee and agent. The bill adds the necessary language and clarification.*" [Emphasis supplied.]

H.R. Rep. No. 2320, 82d Cong., 2d Sess. 15 (1952).

The foregoing excerpts amply demonstrate that Congress never intended the terms "receiver" or "trustee" to include a consensually appointed liquidating agent. When Congress thought it necessary to bring a liquidating agent within the coverage of the statute, appropriate amendments were made, but no such amendment was ever made or proposed, however, for Section 3a(5). As this Court has previously stated, "where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it." *Hamilton* v.

Rathbone, 175 U.S. 414, 419 (1899). Moreover, the relevant and undisputed legislative history demonstrates that Congress deliberately excluded the appointment of a liquidating agent from the coverage of Section 3a(5).

III.

The Petition for Certiorari Does Not Present a Question of Great Public Concern.

Petitioners allege that the question presented "is of great public concern . . . ", (Pet. at 5) allegedly because an insolvent broker-dealer, such as Blair, would be able to defeat bankruptcy proceedings by appointing a liquidating agent (Pet. at 8). The Petitioners are egregiously wrong. First, the Bankruptcy Act specifies six acts of bankruptcy. The commission of any one of those acts could serve as the basis for an involuntary adjudication in bankruptcy, notwithstanding the appointment of a liquidating agent.

Secondly, the Petitioners completely ignore the enactment of the Securities Investor Protection Act of 1970, 15 U.S.C. §§78aaa, *et seq.* Said Act effectively resolves the question presented herein. The insolvency of a registered broker or dealer will subject it to proceedings under the supervision of the Securities Investor Protection Corporation and the provisions of that Act.

Section 5(b)(1)(A) of the aforesaid Act, 15 U.S.C. §78eee(b)(1)(A), expressly provides that, upon application of the Securities Investor Protection Corporation, a United States District Court may determine that customers of a broker-dealer are entitled to the benefits of said Act if such member

"(i) is insolvent within the meaning of section 1(19) of the Bankruptcy Act, or is unable to meet its obligations as they mature, or (ii) has committed an act of bankruptcy within the meaning of section 3 of the Bankruptcy Act, or (iii) is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such member has been appointed, or (iv) is not in compliance with applicable requirements under the 1934 Act or rules or regulations of the Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities, or (v) is unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules or regulations."

Because it is undisputed that Blair was insolvent within four months of the filing of the involuntary petition in bankruptcy, there is no question that Blair falls within the terms of the foregoing excerpt and that the benefits of the Securities Investor Protection Act would have been available to Blair's customers if said statute were not prospective. See *Lohf* v. *Casey*, 330 F.Supp. 356 (D. Colorado 1971); H.R. Rep. No. 1613, 91st Cong., 2d Sess. 14 (Oct. 21, 1970). In any event, however, the issue raised by the petition for certiorari will not arise in the future as to stockbrokers. Accordingly, it is submitted that the question presented is not an important matter of federal law which warrants review by this Court.

IV.

Section 3a(5) of the Bankruptcy Act Is Specific and Should Not Be Judicially Enlarged.

The court below correctly noted (Pet. App. "A" at 20) that Foley disregarded the legal significance of the terms "receiver" and "trustee" contained in Section 3a(5) of the Bankruptcy Act, as well as the legislative history of said section, on the grounds of policy. Foley also disregarded the particularity with which the acts of bankruptcy are enumerated in Section 3. Unless described by Section 3, however, no action by an insolvent debtor can precipitate an involuntary bankruptcy proceeding. 1 Collier, Bankruptcy ¶3.03 at 403 (14th Ed. 1971). Moreover, it is well established that "when acts of bankruptcy are classified . . . it is not the province of the court to enlarge the classification. . . ." *In re Empire Metallic Bedstead Co.*, 98 F. 981, 982 (2d Cir. 1899).

> "[T]his statute (while remedial) should be construed strictly. . . . In other words, its scope should not be enlarged so as to include transactions that may appear to be analogous but are obviously not contemplated by the statute. A court of bankruptcy has no power to extend the Bankruptcy Act. . . ."

Maplecroft Mills v. *Childs*, 226 F. 415, 419 (4th Cir. 1915).

Foley suggests that the effect of the Court of Appeals' decision would be to deny to creditors "the right to select their own trustee to control a liquidation" (Pet. at 7). It is undisputed, however, that Blair's creditors were not prevented from alleging any of the other acts of bankruptcy, namely, a fraudulent conveyance, a preferential transfer,

or the debtor's failure to vacate or discharge a lien, in order to subject Blair to involuntary bankruptcy during the Liquidator's tenure, if the facts had warranted it. Furthermore, as previously demonstrated, Blair's creditors were in fact denied none of their rights against Blair when the Liquidator was appointed. Accordingly, the case of *In re Bonnie Classic, Inc.*, 116 F. Supp. 646 (S.D.N.Y. 1953), relied upon by the referee and the District Court is inapposite. In that case, the directors of the corporation became *statutory* trustees under New York law, acquired title to as well as possession of the debtor's property and were vested with injunctive powers against creditors of the debtor.

Foley's suggestion that the holding of the court below would deprive the bankruptcy court of exclusive jurisdiction over the Blair estate also ignores Blair's filing of a petition for an arrangement under Chapter XI of the Bankruptcy Act on April 15, 1971. By virtue of Section 311 of the Act, 11 U.S.C. §711, Blair became subject to the bankruptcy court's "exclusive jurisdiction" (Pet. App. "A" at 13-14). Proceedings in ordinary bankruptcy have been stayed pursuant to Section 325 of the Act (Pet. App. "A" at 14) and Blair is rapidly proceeding toward confirmation of its proposed arrangement, the requisite majority in number and amount of creditors' acceptances having been obtained.

In view of the foregoing, no rational basis for a judicial enlargement or modification of the acts of bankruptcy, as suggested by Foley, has been advanced. As recently noted by Chief Justice Burger of this Court,

> "the bankruptcy court is but one mode of orderly adjustment with creditors; it is not the only one since

many debtors work out binding private adjustments with creditors."

United States v. *Kras*, —— U.S. ——, 93 S.Ct. 631, 640 (1973) (concurring opinion). Accordingly, the Court of Appeals was entirely correct in construing what Congress enacted and in not eliminating the act of bankruptcy requirement as a condition to an involuntary adjudication.

V.

No Sound Reason Exists for the Granting of the Petition for Certiorari.

The decision of the Court of Appeals represents the only reported decision of an appellate court as to the precise question involved herein. The decision is in accord with the legislative history and plain language of the statute. The Court of Appeals found that Mr. Scorese as a Liquidator "did not meet what is usually regarded as essential to the status of a receiver, namely, appointment by a court." (Pet. App. "A" at 15). The court also determined that Mr. Scorese "lacked one element essential to the normal concept of trusteeship, namely, legal title to the property." (Pet. App. "A" at 16).

As hereinabove stated, the Court of Appeals has not decided an important question of federal law which should be settled by this Court. The decision below involved elementary and established rules of statutory construction. Indeed, even the dissenting opinion below noted that the "approach of the majority cannot be said to be an unreasonable one." (Pet. App. "A" at 24).

In essence, Petitioners herein seek to involve the Court in an academic debate concerning the construction of pro-

visions of the Bankruptcy Act, which, thus far, have not given rise to any conflicting decisions between the judicial circuits. As stated in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955), "... this Court does not sit to satisfy a scholarly interest .... Nor does it sit for the benefit of particular litigants."

The petition herein is sought only for the peculiar benefit of Foley and is not sought to settle any real conflict of opinion and authority. Therefore, there exists no sound reason which would favor the issuance of a writ of certiorari to the Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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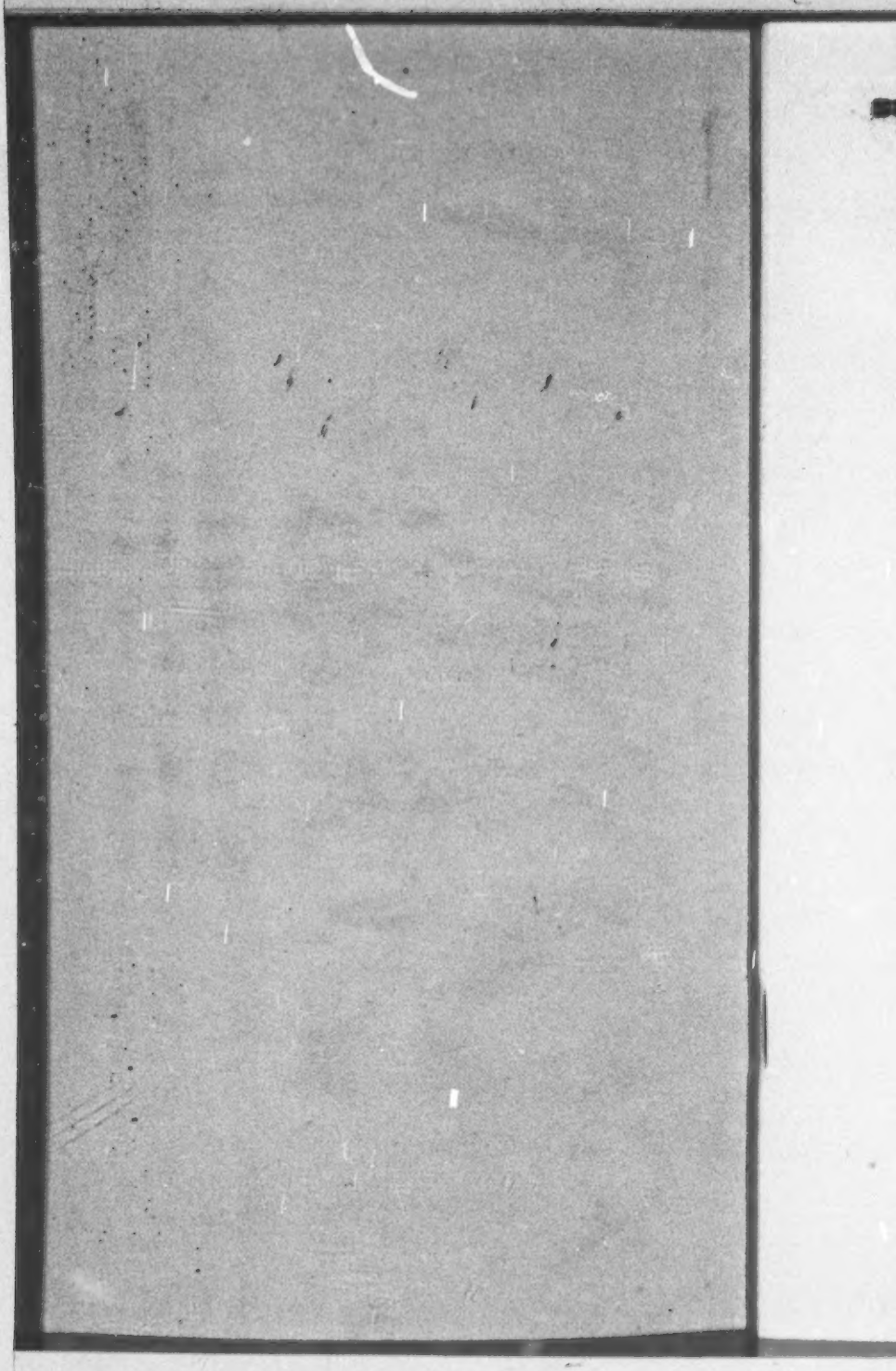

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-1154

JOHN P. FOLEY, JR., *et al.*,
Petitioners,

vs.

BLAIR & CO., INC., *et al.*,
Respondents.

BRIEF OF PETITIONERS

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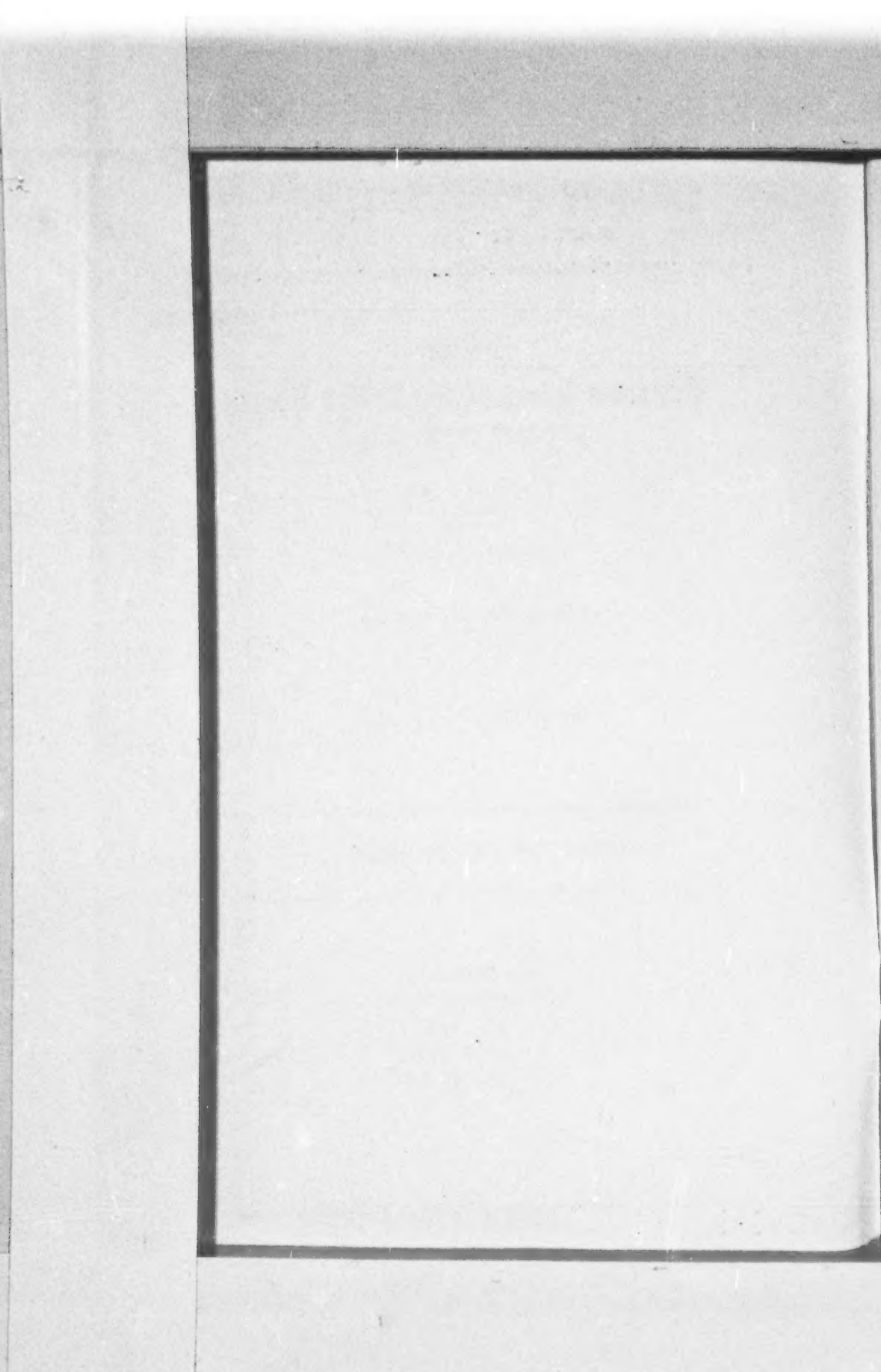

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BRIEF OF PETITIONERS

Official Report of Opinion in the Court Below

The opinion of the United States Court of Appeals for the Second Circuit is reported in 471 F. 2d 178 (1972). The dissenting opinion commences at 471 F. 2d 184.

Jurisdiction

The jurisdiction of the Supreme Court of the United States to issue the discretionary writ of certiorari was invoked pursuant to the Judiciary Code of the United States, 28 U.S.C. § 1254(1), by the filing of a Petition for

writ of certiorari on February 21, 1973 to review the judgment of the United States Court of Appeals for the Second Circuit entered December 11, 1972, upon the grounds that the United States Court of Appeals for the Second Circuit has decided an important question of Federal law arising under Section 3(a)(5) of the Bankruptcy Act (11 U.S.C. § 21(a)(5)) which has not been but should be settled by the Supreme Court of the United States, and has decided it by a divided Court in a manner in conflict with every other decision rendered by any Court on the same subject.

Statutory Provision

The statute interpreted by the United States Court of Appeals for the Second Circuit is Section 3(a)(5) of the Bankruptcy Act (11 U.S.C. § 21(a)(5)):

> "Acts of Bankruptcy by a person shall consist of his having . . .
>
> (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."

Question Presented

Although this proceeding involved other issues at its inception, only one issue remains for the determination by this Court, to wit:

Was the designation of a person named as a Liquidating Agent with the broad powers equivalent to those of a receiver or trustee, to take charge of the assets of BLAIR & Co., INC., for the purpose of liquidating of that concern, an Act of Bankruptcy within the scope of Section 3(a)(5) of the Bankruptcy Act (11 U.S.C. § 21(a)(5))?

Statement of Case

The basic facts out of which this issue arises are essentially simple and undisputed. In September, 1970, BLAIR & Co., INC., a Delaware corporation engaged in the stock brokerage business on Wall Street as well as in any other States throughout the nation, decided to terminate its business by liquidation (A9, 10). It entered into a contract with the NEW YORK STOCK EXCHANGE by the terms of which the NEW YORK STOCK EXCHANGE was given the power to appoint a Liquidator to take charge and conduct this liquidation (A34). On or about September 25, 1970, PATRICK E. SCORESE was appointed Liquidator (A10), and took over all of the affairs of BLAIR & Co., INC., under a broad Power of Attorney, containing all of the powers, and more, of any receiver or trustee that could have been appointed by a Court, or by a contract, except that he served without bond and with no control by any Court or any principal. All powers enumerated in the contract and the Power of Attorney (A34-A65) were strictly within the discretion and control of the Liquidator, who was donominated in the contract as a "Liquidator", but in the Power of Attorney as an "Agent". The power was "coupled with an interest and irrevocable". (A64)

. It was, and is the contention of Petitioners that regardless of nomenclature, the intent of the designation, the purpose of the appointment, and the powers bestowed upon MR. SCORESE, brought the fact of his appointment within the scope of § 3(a)(5) of the Bankruptcy Act, and constituted an Act of Bankruptcy.

POINT I

A history of the enactment of the successive acts leading to the present §3(a)(5) clearly demonstrates the intention of the Congress to have been to reserve paramount jurisdiction of the liquidation of insolvent concerns to the Federal judiciary pursuant to the Bankruptcy Act to the exclusion of other means of administration of liquidations.

Many years ago, this Court declared:

> "The operation of the bankruptcy laws of the United States cannot be defeated by an insolvent commercial corporation applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."
>
> *In Re Watts,* 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933

The history of the evolution of the present §3(a)(5) is succinctly set forth in COLLIER ON BANKRUPTCY Vol. 1, ¶3.501, et seq. pp. 491-497. Prior to 1903, the use of a receivership instead of an Assignment for the Benefit of Creditors was an effective device used to avoid the rule as to paramount and exclusive jurisdiction of liquidations of insolvent companies under the Bankruptcy Act, and in that year, Congress amended the fourth Act of Bankruptcy so as to add to the General Assignment for the Benefit of Creditors as an Act of Bankruptcy the language

> "or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States."

Unfortunately, the wording of this Act gave rise to many difficulties, and in 1926, Congress attempted to remedy the situation by rephrasing and renumbering this provision subdivision (5), and separating it from the General Assignment clause to read:

> ". . . while insolvent, a receiver or trustee has been appointed, or put in charge of his property."

Two significant items of this amendment must be pointed out, to wit: Congress deleted the words, "under the laws of a state, of a territory, or of the United States", but continued the words "put in charge of his property" which had appeared in the 1903 Act.

The 1926 amendment, however, continued to present difficulties, and in 1938, Section 3(a)(5) of the Bankruptcy Act was amended to its present state to read as follows:

> "§3. Acts of Bankruptcy. a. Acts of bankruptcy by a person shall consist of his having . . . . .
>
> (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."

It is interesting to note that COLLIER states in its text, "This should result in a curb on receiverships", (V.1 ¶3.502 p. 497) citing that the House of Representatives had stated in enacting this new definition:

> "The amendment was made to curb abuses which had arisen in equity receiverships, in which a court was persuaded to appoint a receiver on the theory that the business was momentarily embarrassed and would work itself out. It often developed that the company was hopelessly insolvent in the bankruptcy sense, but if four months had elapsed no proceedings in bankruptcy could be taken and creditors suffered heavy losses."

The Senate Committee on the Judiciary likewise stated in its report on this amendment that the intent was to broaden "the scope of the act of bankruptcy in order to reach the widening prevalent abuse of collusive equity receiverships." (Senate Report No. 1916, 75th Congress, Third Session 12, 1938).

Attention must also be called to the fact that in this third enactment of this Act of Bankruptcy, the phrase "to take charge of his property" remained consistently in the Act.

It is clear from the various changes that took place in the enactments hereinabove noted, that, based upon the premise that liquidations of insolvent companies should be within the paramount and exclusive control of the Federal Judiciary to the exclusion of other means of liquidation, the intention of Congress at all times was to enact a law which would avoid the evil of liquidation of insolvent companies by any method controlled or instigated by its management, and to enable creditors, who are, and at all times were, the real parties in interest in any liquidation, to petition into the Bankruptcy Courts any insolvency situation which evaded the creditors' right to control and supervise the liquidation. All of the other Acts of Bankruptcy were clearly keyed to the very purpose of the law of Bankruptcy, to wit: to liquidate the assets of an insolvent debtor and make a fair distribution among all of its creditors equally. The right to supersede a General Assignment for the Benefit of Creditors under State law, to set aside a fraudulent conveyance, or a preference, are all indications of the intent of the Bankruptcy Act to effectuate that purpose. When prior to 1903, the device of a receivership was resorted to as a means of evasion of the paramount jurisdiction of the Federal Court, the first provision superseding receiverships

and trusteeships, was enacted, and the fact that the phrase, "put in charge of his property" was consistently retained throughout the three enactments points to the fact that it was not identity of the persons appointed to liquidate the business that was the determining factor, but it was the "putting in charge" of the insolvent debtor's assets which became the basic act which justified the invoking of Federal jurisdiction. In that sense, the instant case may be said to be one of first impression, in that apparently, nobody had ever considered appointing an agent, instead of a trustee "to take charge of the property" of an insolvent debtor. Heretofore, instruments appointing liquidators always referred to trustees, and it is clear that the situation in the instant case was deliberately set up as an attempt to evade the jurisdiction of the Bankruptcy Act as clearly as it had probably been done prior to 1903, through the appointment of "collusive equity receiverships". Certainly, the appointment of a person to take charge of the liquidation of a stock brokerage firm with all of the powers given to the liquidator in this case, can be, and probably would be as collusive as any "collusive equity receivership", as no provision can be found in the agreement or Power of Attorney that the liquidator, whether he be agent or otherwise, was required to account to, or report to anybody at all as to his stewardship, was required to post a bond for the performance of his duties, had neither power, nor authority, nor any instructions to investigate or pursue any defalcations, waste, preferences, or fraudulent conveyances made by the former management*, nor is there any indication in this case that the Liquidator whether he be agent, trustee or receiver ever intended to do any of these things, or to account to creditors for his liquidation, to the corporation

* Approximately 10 million dollars in secured demand notes and subordinated debentures had been withdrawn from Blair within one year prior to the petition, (A107, 108) of which $1,400,000 belonged to the Chairman of the Board of Directors (A128, 129).

on whose behalf he was appointed, or even to the NEW YORK STOCK EXCHANGE who appointed him. This is a situation far worse than any abuse of an equity receivership, or potentially more collusive than any equity receivership could possibly be. It was the equivalent of the appointment of a trustee with no rights to equitable relief to which any beneficiary of a trust would be entitled, and is clearly the object of Congress's intent in enacting the Statute, even in its earlier form, and much more so in its present form.

The intent of the enactment of §3(a)(5) in all of its forms was clearly echoed by JUDGE WEINFELD in the celebrated case of IN RE BONNIE CLASSICS INC., 116 F. Supp. 646 (U.S.D.C., S.D.N.Y.) where he stated:

> "Were the position contended for by the alleged bankrupt to be upheld it would at once be the effective means of defeating the exclusive jurisdiction of the bankruptcy courts. It would enable directors whose administration brought a corporation to its insolvent plight to take charge of the corporate assets and their distribution to the exclusion of creditors and deny the latter the right to select their own trustee. It would provide a neat way for derelict directors to gain immunity from the investigative and discovery techniques and summary procedures set up under the Bankruptcy Act. In sum, it would deprive creditors of the comprehensive powers of the Bankruptcy Act aimed at the expeditious recovery of assets which may have been diverted or transferred from an insolvent estate. The history of the Bankruptcy Act makes it clear that no such untoward result was contemplated by §3, sub.a(5)."

POINT II

Although denominated a liquidator or liquidating agent, the party appointed was in effect a receiver or trustee of Blair & Co., Inc.

In the instant case, MR. SCORESE was not at any time acting on behalf of BLAIR or its Board of Directors or under their instructions, as an agent normally would. Although the document setting forth his powers was denominated a Power of Attorney, a reading of the document itself clearly reveals that MR. SCORESE was the ultimate authority himself in making any determination as to the method and the ultimate goal of liquidation. The fact is that all but one of the directors of BLAIR & Co., INC., resigned upon his appointment, and MR. SCORESE has been the sole judge and guide in the entire process of liquidation to this very day. He was given full authority to do so in the document granting his powers. He had every prerogative that any Receiver or a Trustee could possibly have, and the fact that he was called a Liquidating Agent, instead of a Trustee or a Receiver, was simply a matter of nomenclature, and scrutiny of his powers, rather than the title, reveals no doubt of the fact that MR. SCORESE was in full charge or full control of BLAIR & Co., INC., with the same force and effect as if he had been named in the document outlining his powers, as a Receiver or as a Trustee.

It is extremely interesting to note that throughout the entire contract between the NEW YORK STOCK EXCHANGE (A34-A46) the term, "a[illegible]" does not appear. Commencing with paragraph VI of that agreement, where the Exchange was given the right "to appoint such person as it may choose as Liquidator of the business of the corporation",

the contract constantly refers to a "Liquidator", and not to an "agent". In paragraph VIII, it is expressly agreed that

> "the Liquidator shall take control of the business and property of the corporation for the purpose of liquidating the business of the corporation."

He was by this contract to have sole and complete control of the liquidation:

> "i.) *He* shall promptly take such steps as *he* may deem practical . . .
>
> ii.) *He* shall have power to retain public independent accountants, etc.
>
> iii.) *He* shall . . . assert and collect and settle all claims and rights of the corporation.
>
> iv.) *He* shall pay any claim against the corporation *considered by him* to be a valid claim . . .
>
> v.) *He* shall take such other steps *as he deems necessary or appropriate* to liquidate the business of the corporation." (italics ours).

It is clear from this language of the basic contract that the party contemplated was to have sole and complete control of the liquidation without supervision, and to that extent, he comes clearly within the definition and the scope of a Receiver or a Trustee in charge of a liquidation.

In the Power of Attorney form, (A48-A64) it is significant to note in the opening of the document itself that the party to be designated is still referred to as "Liquidator", and only subsequently as "Agent", but a reading of the powers granted in this document clearly reveals that the person designated, whether a Liquidator or an Agent, is given every power usually granted to a Trustee or to a Receiver, whichever he might be called, with absolutely no provision therein for control, direction, supervision or even

the expression of an opinion by a principal. It is significant to note that in banking transactions, he is given the right to open and maintain bank accounts *in his name alone,* (A50) *to sign corporation checks,* (A50) *to sell* bonds and shares, (A53) *to sell* personal *property,* (A56) *to sell* real estate, (A57) "to execute . . . any . . . instrument or document *which the Agent may think useful* . . . for the liquidation of the business of the corporation" (A62), "to do any other act or acts . . . which the corporation is able to do and which the Agent shall think to be desirable or necessary for the liquidation of the business" (A63).

Lastly, it is important to point out that the Power of Attorney concluded with "This power of attorney is a power coupled with an interest and is irrevocable". (A64).

In determining whether Mr. Scorese was an Agent or a Trustee, or even both, it has been held in California and in Maryland that the name given to the intermediary was not conclusive.

> *Hayden Plan Co.* v. *Wood* (1929) 275 P. 248, 97 Cal. App. 1;
>
> *Gittings* v. *Morris,* (1929) 144 A. 836, 927, 156 Md. 565.

In Colorado, a transfer by a debtor for the benefit of creditors was treated as creating a trust and common law assignment, although the document was in the language of a grant of power of attorney.

> *McMullin* v. *Keogh-Doyle Meat Co.,* (1935) 42 P.2d 463, 96 Colo. 298.

> "The contractual and extremely personal nature of agency makes it a relationship dependent on the continued existence of both parties *and on the will of the principal.* . . . A trust, being impersonal and

partaking of the nature of a conveyance, is not usually dependent on the survival of the parties, nor is it revocable by the settlor in the absence of power expressly reserved."

• • • • •

An agent is subject to the control and direction of his principal, whereas neither the trustor nor the beneficiary of a trust has such power unless it was expressly reserved or granted in the trust instrument. Agency is formed with the thought of constant supervision and control by the principal. Trust is based on the idea of discretion in the trustee and guidance by the settlor or cestui only to a limited extent and when expressly provided for. If a transaction is called a trust but gives too much power to the settlor and leaves the so-called trustee a mere tool, it has been held that there is in reality a mere agency. (WARSCO v. OSHKOSH SAVINGS & TRUST CO., (1924) 196 N.W. 829, 183 Wis. 156. 160, 161.). . . . The lack of such complete control is frequently persuasive evidence that a questionable relationship is not an agency.

• • • • •

In some cases the question is whether the initiator of a transaction intended a trust or an agency. *The answer will depend not so much on the language used, as on the characteristics and purposes of the relationship.*" (Italic ours).

Bogert on Trusts, §15 p. 73-76.

Although the power of attorney upon which the appointment of MR. SCORESE is based purports to name him as an Agent, the characteristics and purposes of the relationship clearly identify MR. SCORESE as a Trustee, primarily because control of his activities is clearly delineated as being completely within his own discretion, and not subject to the will of any principal. A reading of the express powers set forth in the power of attorney (A49-A64) coupled with

those contained in paragraph VIII of the contract (A41-A42), clearly reveals that MR. SCORESE had the ultimate and complete control of all decisions and all acts to be performed by him in liquidating BLAIR & Co., INC. Although named an Agent for BLAIR, he was accountable to nobody, and was to all intents and purposes vested with all of the powers that would ordinarily repose in the officers and directors of the corporation. He was in all respects a czar. Nobody could overrule him, and he was under no obligation to consult with anybody in arriving at his decisions and performing his functions. In that respect, he was completely a Trustee, and no sense an Agent. In that same regard, he was a Receiver with powers greater than a Receiver, in that he had no obligation to account to a Court or to any of the parties involved in the transaction who had appointed him. The only power that existed to which MR. SCORESE could be compelled to make obeisance, was the Federal Judiciary by reason of the paramount and exclusive jurisdiction created by the Bankruptcy Act.

POINT III

A proper construction and interpretation of §3 (a) (5) impels the conclusion that the appointment of a liquidator to take charge and liquidate the assets of Blair came within the scope of §3 (a) (5) of the Bankruptcy Act.

In interpreting § 3(a)(5) of the Bankruptcy Act so as to exclude the appointment of MR. SCORESE from the scope of that Section, Respondent and the Court below expressly repudiate the language set forth in the text of the two leading commentaries on the law of Bankruptcy, to wit: COLLIER and REMINGTON.

COLLIER ON BANKRUPTCY, Vol. 1, ¶3.502 states:

> "'Trustee' means much the same as 'receiver', the nomenclature varying in different states. *The term is also intended,* no doubt, *to include liquidation agents generally,* who though performing much the same functions as receivers, may not be appointed by a Court." (citing Matter of R. V. SMITH Co., INC., 55 Am. B.R. (N.S.) 758, 38 F. Supp. 57.)

§ 3.503 (p. 502):

> "It is not essential that there be an appointment of a receiver by a court; *an executed agreement to wind up the affairs of a corporation* and make an assignment of all its property to the directors as trustees to close up its business comes within this act of bankruptcy." Haubtman & Loeb v. Dunbar Molasses Co. (C.C.A., 5th Cir.), 8 Am. B.R. (N.S.) 22, 13 F. (2d) 335; In re Bennett Shoe Co. (D.C. Conn.), 15 Am. B.R. 497, 140 Fed. 687; In re Hercules Atkin Co., Ltd. (D.C. Pa.), 13 Am. B.R. 369, 133 Fed. 813; In re Lisk Mfg. Co. (D.C.N.Y.), 21 Am. B.R. 674, 167 Fed. 411; In re Electric Supply Co. (D.C. Ga.), 23 Am. B.R. 647, 175 Fed. 612; Vassar Foundry Co. v. Whiting Corp. (C.C.A., 6th Cir.), 5 Am. B.R. (N.S.) 262, 2 F. (2d) 240. (emphasis supplied)

* * * * *

(P. 503)

> "It can be asserted as a general proposition that the appointment of any officer, for the purpose of winding up insolvent partnerships or corporations, which substantially abridges or deprives creditors of the right to a trustee of their own choosing, or of the greater right to compel prorating between all creditors of the same class, or any other right given them by the Bankruptcy Act, will amount to the fifth act of bankruptcy, if the requirements of insolvency or inability to pay debts as they mature

be present, and if the appointment be within the four-month period."

In re Electric Supply Co. (D.C. Ga.), 23 AM. B.R. 647, 175 Fed. 612.

See also *Fish* v. *East* (C.C.A. 10th, 1940), 44 AM. B.R. (N.S.) 206, 114 F. (2d) 177.

COLLIER'S BANKRUPTCY MANUAL, p. 90, uses the same language.

* * * * *

REMINGTON ON BANKRUPTCY, Vol. 1, § 157, p. 247:

"Court proceedings are not essential to this act of bankruptcy. It can occur through statutory winding up and liquidating without any court action whatsoever." (citing Re Hercules Atkin Co. 133 F. 813, 13 ABR 369 (1904, DC. Pa.); Re: C.H. Bennett Shoe Co. 140 F. 687, 15 ABR 497 (1905 DC. Conn.).

§ 160, P. 249:

"The intention, as appears from the discussion in preceding sections of this subdivision, and particularly from the history of the provision, was to cover all instances of like character regardless of technical designation. *A trusteeship created or set up without any court procedure may* accordingly *be deemed commission of this act of* bankruptcy." (emphasis supplied)

The thrust of Petitioners' position on this appeal may be best characterized by reference to the dissenting opinion of JUDGE TIMBERS below, when he stated:

". . . we are asked to find a narrow purpose behind an Act of Congress, despite the failure of Congress to demonstrate that narrow purpose in the statutory language through the use of drafting devices frequently employed. Where the effect of such

> a reading is to hold in favor of a party whose position relies on language expressly eliminated from the Statute, and thereby to defeat a party whose position falls squarely within the remaining language, I should have thought that we would construe the amendment in the most sensible, rather than the narrowest, manner." (471 F.2d 178, 185)

The argument was made by Respondent and followed by JUDGE FRIENDLY in his Opinion below that a Receiver, in order to be such, had to be judicially appointed by a Court. Initially, it must be pointed out that even the words, "under the laws of the State, of a territory, or of the United States," which was deleted by the Congress in 1926 from the Act, did not require that the Receiver or Trustee be judicially appointed. There is no reason to reject the concept that a Trustee or a Receiver could be appointed by contract, or by stipulation between parties to a controversy. Neither Respondent, nor the Court below has pointed to a Statute of any State, territory or the United States that specifically requires a Receiver to be appointed by a Court in order to be denominated as such. The writer has been unable to locate such a Statute. It would seem that as long as a person was agreed upon, or appointed, to take within his possession and control, or to take charge of, assets for the purpose of preserving or liquidating them, if such appointment was not contrary to the laws of the State, territory or of the United States, it would come within the scope of the language of the previous Statute, without regard to whether or not such a person was appointed by a Court. Certainly, it must be clearly recognized that a Trustee can be appointed by will, by contract or by any Trust instrument without a reference to any judicial proceeding. As quoted above, the use of the terms "receiver" and "trustee" are often interchangeable, depending upon the particular State in which the phrase is

used. No reason has been shown, nor can be shown why MR. SCORESE's designation in the contract between the NEW YORK STOCK EXCHANGE and BLAIR as a liquidating receiver or trustee would have rendered the document in any manner invalid, or different in its ultimate purpose or effect. He would have had identically the same powers he was granted as a Liquidator or Agent.

However, the fact remains that the language relied upon as the basis for the Court's holding below that the Liquidator could not come within the definition of a receiver was expressly repealed by the Congress and a proper interpretation of the particular Section in view of its repeal should permit the inclusion of a Liquidator appointed by contract as coming within the scope of § 3(a)(5), even if this interpretation is based upon the acceptance of the concept of the Liquidator as a trustee, instead of as a receiver. The prerequisite of judicial appointment should be disregarded completely, as it is based upon a misinterpretation of even the very language repealed.

Nor do past precedents reveal that persons "put in charge" of an insolvent debtor's property had to be designated or named in any particular manner, or even appointed by contract. Thus, in Pennsylvania, the District Court held that the appointment of a Sheriff constituted an Act of Bankruptcy, stating:

> "It is made an act of bankruptcy to put a receiver or trustee in charge of the property of a corporation under State laws by § 3, subd. 4, and the substitution of the sheriff to effect the same result will not defeat the provisions of the act.
>
> "In this proceeding, the property of the insolvent corporation is not placed in the hands of a receiver or trustee by that name, but it is so in effect, because the sheriff, after a sale of the property on execution, is required to distribute the net proceeds

> among the creditors of the corporation according to the rules established in cases of insolvency of individuals, and the same as a receiver or trustee would have been required to do under the law relating to insolvent debtors in the state."
>
> Re *International Coal Min. Co.* 143 F. 665, 16 ABR 311 (1906, DC Pa.)

In *Fish* v. *East* (CCA 10th 1940) 44 AM. B. R. (N.S.) 206, 114 F. (2d) 177, a turnover order granted in the Bankruptcy of a parent corporation directing its subsidiary to turn over substantially all its property to the trustee of the parent corporation was held to constitute "the appointment of a receiver or trustee" to take charge of the subsidiary's property, and thus be an Act of Bankruptcy within the meaning of § 3(a)(5).

The contention has been made below that an essential element of a receivership or trusteeship was lacking in that MR. SCORESE was alleged not to have been given title to BLAIR'S assets. This contention disregards the fact that MR. SCORESE was given the right to not only sell any of the assets, but to incumber, pledge and hypothecate personal property (A56), to quitclaim, surrender, mortgage or incumber real estate (A57), to pay claims of customers and other creditors, all within his own discretion, (A50) all of which placed it within his power to dispose of all of the assets of BLAIR & Co., INC., giving good title therefor. Moreover, this contention overlooks the very important fact that the Power of Attorney was specifically denominated as "a power coupled with an interest and is irrevocable." (A64) Exactly what was meant by that provision can only be guessed at, but, certainly, the interest partook of some element of title.

> "In order that a power may be irrevocable because it is coupled with an interest, it is necessary that the interest be in the subject matter of the power and not in the proceeds which will arise from the exercise of power:

"By the phrase 'coupled with an interest', is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate. (Citing TAYLOR v. BURNS, 203 US 120, 51 L ed 116, 27 S. Ct. 40)

Williston on Contracts, Third Edition Vol. 3, § 280 p. 300

An agent in possession of property, which is the subject of his agency, has been held to be a quasi trustee and subject to the control of equity in being compelled to account for his stewardship.

Marvin v. Brooks, 94 N. Y. 71, 80

While it cannot be argued that actual legal title was directly vested in MR. SCORESE, he unquestionably had some of the elements of title, whether by virtue of the interest referred to above, or whether by reason of his obligation as a quasi trustee in actual possession of BLAIR'S assets.

Nor is the contention of the Respondent that the absence of actual legal title disqualifies him from being considered a receiver or a trustee borne out by decided cases on the subject.

Thus, in Missouri, a receiver appointed for a railroad corporation was held to be an officer of the Court with power to act under its direction, but he did not have title to the corporate property.

Jennings Sewer Dist. of St. Louis County v. Pitcairn, (1945) 187 S. W. 2d 750, 238 Mo. App. 704

In Pennsylvania it was held that the receiver of an insolvent corporation does not get legal title, but only "a kind of equitable title".

Blum Bros. v. Girard Nat. Bank (1915)
93 A. 940, 248 Pa. 148, Ann. Cas. 1916D, 609

In South Carolina, it was held that a receiver for an insolvent has no title, title remaining in the insolvent.

Hannon v. Mechanics Building & Loan Ass'n of Spartanburg, (1935) 180 S.E. 873, 177 S. C. 153, 100 A.L.R. 928

Respondents must admit, and it must be accepted as true, that Petitioners could have taken an intermediate step by applying for a State Court Receivership in the State of New Jersey, where BLAIR had moved its offices, solely upon the grounds of BLAIR's insolvency, and after a State Court Receiver had been appointed, an Involuntary Petition in Bankruptcy could have been filed without any possibility of objection thereto as an Act of Bankruptcy. Petitioner elected, with apparently sufficient justification to satisfy a very erudite Referee in Bankruptcy, and a United States District Court Judge to consider the appointment of MR. SCORESE the equivalent of the appointment of a receiver or the designation of a trustee to take charge of BLAIR's assets, and filed the Involuntary Petition on that ground, along with two others, not pertinent before this Court.

The substance, to wit: the appointment of a designee, who was certainly the equivalent of a receiver, and was unquestionably a trustee, to take charge of the assets of BLAIR was undisputed. Whatever criticism may be raised by Respondents as to the procedure taken, there can be no denial of the substantial fact of what had occurred.

In *Pepper* v. *Litton*, 308 U.S. 295, 303 (1939), MR. JUSTICE DOUGLAS stated:

> "Courts of bankruptcy are constituted by §§ 1 and 2 of the Bankruptcy Act (30 Stat. 544) and by the latter section are invested 'with such jurisdiction at

> law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.' Consequently this Court has held that for many purposes 'courts of bankruptcy are essentially courts of equity.' *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 240. By virtue of § 2 a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the Act, it applied the principles and rules of equity jurisprudence. *Larson* v. *First State Bank*, 21 F. 2d 936, 938 . . . In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts. *United States Fidelity & Guaranty Co.* v. *Bray*, 225 U.S. 205, 217.
>
> The bankruptcy courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates. They have been invoked to the end that fraud will not prevail, *that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.*" (Italics ours)

In *Bank of Marin* v. *England*, 385 U.S. 99 (1966), this Court held that:

> "There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."

MR. JUSTICE FRIENDLY, in the court below, summarily dismissed the decision In re: R. V. SMITH Co., 38 F. Supp. 57, 62 (W.D. Okla. 1941) by simply stating:

> "We do not find its reasoning to be persuasive."

It is impossible to guess why JUDGE FRIENDLY did not find its reasoning to be persuasive, but the fact is that the SMITH case followed the learned Opinion of this Court in

Pepper v. *Litton, supra,* by two years and stated succinctly that:

> "The court will not stand on a technicality with reference to form, when substance is alleged . . ."

In that case, the Involuntary Petition alleged the Act of Bankruptcy to be an Assignment for the Benefit of Creditors. It did not allege as an Act of Bankruptcy § 3(a)(5) involved in this proceeding. The Court doubted whether the instruments executed by R. V. SMITH Co., constituted an Assignment for the Benefit of Creditors, but did feel that the document came within the scope of § 3(a)(5) which was not alleged as an Act of Bankruptcy. Had the Court adhered to form, rather than substance, the Pefition would have had to be dismissed. However, the Court declined to dismiss, and following the substance of what had been alleged and found, upheld the Petition and declared the Debtor a Bankrupt.

In the dissenting Opinion below, JUDGE TIMBERS quoted and adopted the express language of JUDGE WEINFELD, referring to him as "a wise and comprehending Judge", in construing § 3(a)(5) of the Bankruptcy Act, stating:

> "It is not required that the transferee of the property be formally 'appointed' as 'trustee' by a ceremonial document referring to him as such. The method adopted to effect the transfer is immaterial. It is the end result that counts. Any action by one who is insolvent which effectively causes the transfer of his property to another for final liquidation purposes appoints the transferee a 'trustee to take charge of his property' under § 3, sub. a(5). By filing the petition for its dissolution the corporation 'procured, permitted or suffered voluntarily • • • the appointment' of such a trustee. Any other construction would defeat the objectives of the Bankruptcy

Act and abort the broad powers of the courts of bankruptcy intended for the uniform adminstration of insolvent estates." In re Bonnie Classics, Inc., 116 F. Supp. 646, 648 (S.D.N.Y. 1953) (Weinfeld, J.)."

Can this Court of Equity truly hold that the mere esignation of a Liquidator with all of the powers given to im cannot be held to be a trustee, merely because of the orm used in the designation?

In making its determination, this Court must consider he effect of its interpretation of the act in question. If his Court were to uphold the right of management of an nsolvent company to avoid the paramount and exclusive urisdiction of the Bankruptcy Courts by the mere designaion of the person entrusted with its liquidation as an Agent, or some such similar title other than specifically that f receiver or trustee, it would immediately condone the reation of a broad highway for fraud and evasion of the ights of creditors in the liquidation of insolvent companies nd would countenance a technique whereby officers and irectors of an insolvent company could waste and dissipate ts assets, and control the method of liquidation so as to prevent and avoid interrogation, investigation and prosecuion for mismanagement, fraudulent conveyances, preferenial transfers and similar acts of fraud and deceit. Such n interpretation would circumvent the very amendments f the particular Act of Bankruptcy which had already been nacted.

The public interest in this interpretation becomes even nore imperative because the debtor in this instance was a tockbroker, which was itself a fiduciary insofar as its ustomers were concerned, and has been subject to broad

and complex regulations under the laws of the United States, but exempted from the coverage of some of these laws by special arrangement with the NEW YORK STOCK EXCHANGE, which may be said to have had a very vital interest in preventing too deep an investigation into the management of the debtor prior to its demise. Certainly, and particularly in the case of a stockbroker, the public interest should demand liquidation under the supervision of the Federal Courts, rather than liquidation by a hand-picked designee of the NEW YORK STOCK EXCHANGE. This Court must consider whether it would so interpret § 3(a)(5) of the Bankruptcy Act, as to permit the liquidation of an insolvent company in any other industry by a hand-picked designee of a trade association of which the insolvent debtor was a member, merely because the designee was named an "agent", instead of a receiver, trustee, or Assignee for the Benefit of Creditors. Could this Court interpret and construe § 3(a)(5) of the Bankruptcy Act as authority for the proposition that a receivership created by an Order of a State Court, an Assignment for the Benefit of Creditors executed by virtue of a State Statute, or a Deed of Trust executed by virtue of common law of the several States, could all be superseded pursuant to the authority granted by § 3 (a)(5) of the Bankruptcy Act, yet a hand-picked designee selected by the management of an insolvent company, or by a trade association, or organization of which it was a member, could not be superseded because the person designated was named as an "agent", or some such similar title, not specifically set forth in the Act itself?

Certainly, it cannot be held that the intention of Congress was to permit so absurd and unjust a concept.

CONCLUSION

The designation of the liquidator coming within the scope of §3(a)(5) of the Bankruptcy Act, the determination of the Court of Appeals dismissing the involuntary petition in bankruptcy, should be reversed, and adjudication of Blair & Co., Inc., reinstated.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1154

In the Matter

of

BLAIR & CO., INC.,

Debtor.

JOHN P. FOLEY, JR., J. P. FOLEY & CO., INC. and ANITA SALISBURY,

Petitioners,

against

BLAIR & CO., INC. and PATRICK E. SCORESE, as Liquidator appointed by the New York Stock Exchange, Inc. for BLAIR & CO., INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS

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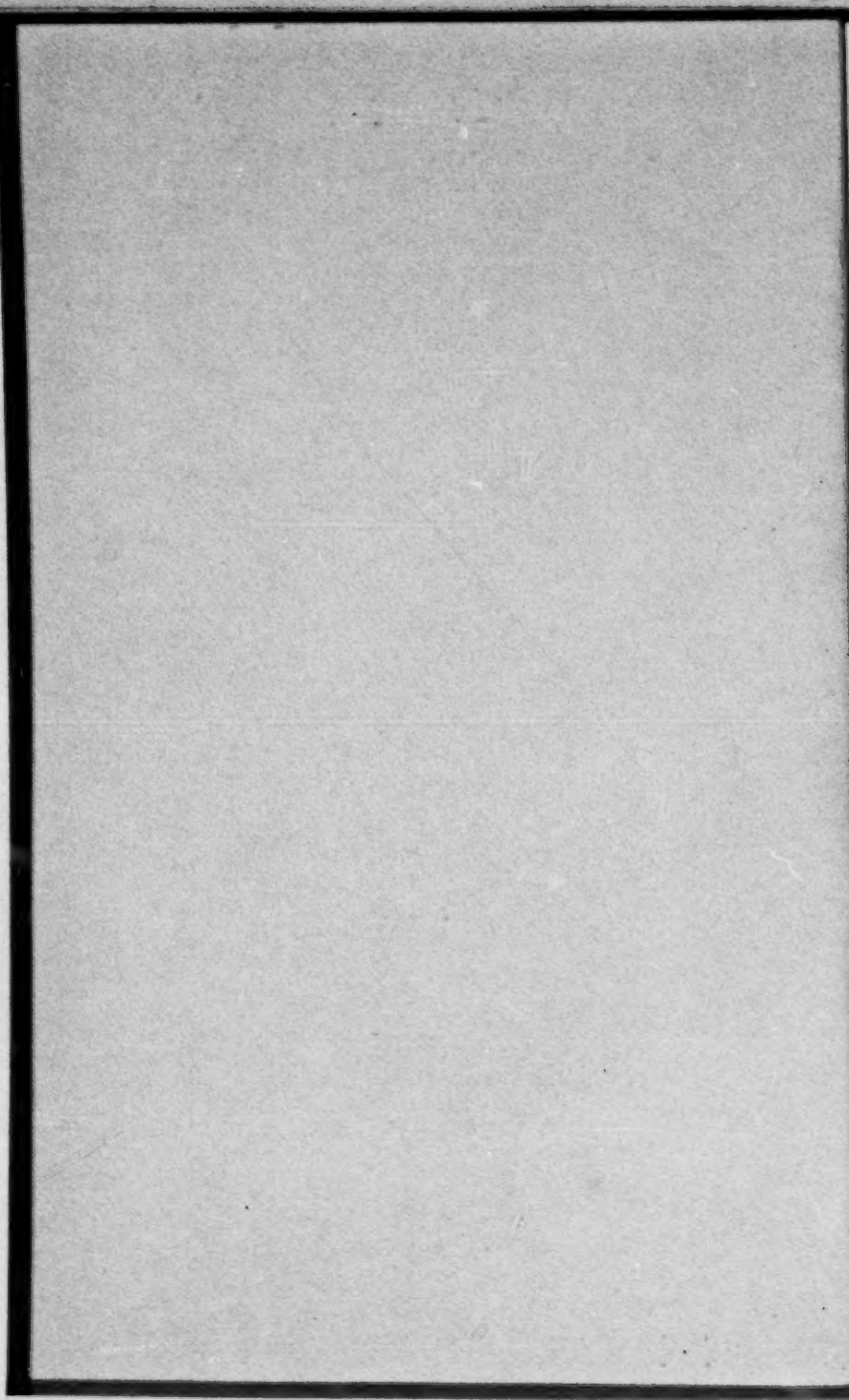

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1154

In the Matter
of
BLAIR & CO., INC.,

Debtor.

JOHN P. FOLEY, JR., J. P. FOLEY & CO., INC.
and ANITA SALISBURY,

Petitioners,

against

BLAIR & CO., INC. and PATRICK E. SCORESE, as Liquidator appointed by the New York Stock Exchange, Inc. for BLAIR & CO., INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS

Orders and Opinions in the Courts Below

The opinion of the United States Court of Appeals for the Second Circuit (the "Court of Appeals"), dated December 11, 1972, is reported at 471 F.2d 178 (2d Cir. 1972) (Pet. App. "A"* at 10).

* References in parentheses to "Pet. App." refer to Appendices "A", "B" or "C" annexed to the petition for certiorari herein and the pages thereof.

John P. Foley, Jr., J. P. Foley & Co., Inc. and Anita Salisbury (hereinafter collectively referred to as "Petitioners" or "Foley") filed a petition with this Court on February 21, 1973 for a writ of certiorari to the Court of Appeals. The Court granted Foley's petition on April 16, 1973.

The case at bar has its genesis in the filing by Foley of an involuntary petition in bankruptcy against Blair & Co., Inc. ("Blair") with the United States District Court for the Southern District of New York ("District Court") on September 29, 1970. The judgment of the Court of Appeals reversed an order of the District Court dated March 15, 1972 (Pet. App. "B" at 25) and directed the dismissal of the involuntary petition in bankruptcy on the ground that Foley had not sustained the burden of establishing the commission of an act of bankruptcy by Blair. The order of the District Court had affirmed a decision of a referee in bankruptcy. The referee found that the consensual appointment of an agent to liqudiate the property of Blair, who was not vested with title to such property and whose appointment was not judicially made or made pursuant to a statute, was the equivalent of the appointment of a "receiver" or "trustee" within the meaning of Section 3a(5) of the Bankruptcy Act (the "Act"), 11 U.S.C. §21a(5), and constituted the commission of an act of bankruptcy by Blair.

The majority opinion of the Court of Appeals, after an analysis of the legislative evolution of Section 3a(5) of the Act, concluded that a consensually appointed agent who would act on behalf of the corporation in the liquidation of its property, but who had no power to restrain or impede

creditors in the exercise of their rights, was not a "receiver" or "trustee," as those terms are used in said section of the Act.

Jurisdiction

Foley invokes the jurisdiction of this Court under Section 24c of the Bankruptcy Act, 11 U.S.C. §47c, although the brief of Petitioners does not so state.

Statute Involved

The instant appeal is concerned with the alleged commission of an act of bankruptcy under Section 3a of the Act, 11 U.S.C. §21a. Section 3a of the Act sets forth six acts of bankruptcy. The commission of one or more acts of bankruptcy by the alleged bankrupt must be established as a prerequisite to an adjudication in bankruptcy. In connection with this appeal, Foley relies solely upon Section 3a (5), the fifth act of bankruptcy, which provides, in relevant part, as follows:

> "Acts of bankruptcy by a person shall consist of his having * * * (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property * * *."

Question Presented for Review

Is the consensual appointment of a liquidating agent, who is not vested with title to the debtor's property and whose appointment does not affect the rights of creditors, the commission of an act of bankruptcy under Section 3a(5) of the Act, 11 U.S.C. §21a(5)?

Statement of the Case

The relevant and salient facts pertaining to this case are as follows:

1. Prior to September 21, 1970, Blair was engaged in the general brokerage and commission business, maintaining its principal place of business at 20 Broad Street, New York, New York. It was a registered broker-dealer and a member of the New York Stock Exchange, Inc. (the "Exchange") as well as other national securities exchanges (9A, 10A*).

2. On or about April 3, 1970, Foley contributed to Blair a secured demand note collateralized by marketable securities in order to increase Blair's capital, allow it to be in capital compliance under the rules of the Exchange and continue its business (82A-95A). Foley's right to the return or withdrawal of the moneys and securities contributed to Blair was subordinated to the rights of all public customers and other creditors who had not also subordinated their rights and claims (Pet. App. "A" at 12).

3. In the early summer of 1970, Blair commenced a program of self-liquidation, which entailed the transfer of its customer accounts to other brokers or dealers and the delivery of securities as designated by customers. In order to expedite the satisfaction of public customers' claims and to provide customer assistance, if necessary, Blair entered into an agreement with the Exchange on September 21, 1970. That agreement provided, *inter alia*, that the Exchange

* Numbers in parentheses followed by "A" refer to pages of the joint appendix.

would have the right to appoint a "Liquidator" in the event that the Trustees of the Exchange's Special Trust Fund made a loan to or guaranteed any obligation of Blair (34A-65A).

4. The Exchange's Special Trust Fund was established in 1964 to (a) provide public customer assistance, where appropriate, in the case of a financially distressed member organization and thus alleviate the hardship which might otherwise be incurred by public customers if such member organization became involved in a bankruptcy proceeding; and to (b) avoid a loss of confidence on the part of public customers in the securities market (16A).*

5. On September 25, 1970, the Trustees of the Special Trust Fund made an initial advance to Blair (18A). Pursuant to the terms of the agreement dated September 21, 1970, the Exchange thereafter appointed Patrick E. Scorese as Liquidator for Blair (18A). Mr. Scorese was appointed for the purpose of assisting Blair's public customers through the use of advances from the Special Trust Fund and to implement the program of liquidation previously adopted by Blair's management (16A). The Liquidator was given authority and power by Blair's board of directors to act for and on behalf of Blair in connection with its assets and properties (48A-64A).

6. On September 29, 1970, Foley filed with the District Court an involuntary petition in bankruptcy against Blair (26A-31A), which asserted, *inter alia*, that the appointment of Mr. Scorese resulted in the commission of an act of bankruptcy by Blair.

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* The function of the Special Trust Fund has been terminated by the enactment of the Securities Investor Protection Act of 1970, 15 U.S.C. §§78aaa, *et seq.*, which affords financial protection to customers of a financially distressed broker or dealer.

7. At the time of the filing of the involuntary petition in bankruptcy, Blair maintained approximately 28,000 public customer accounts and held more than $75,000,000 in securities, approximately $40,000,000 of which, including those of customers, were pledged with banks as collateral for loans approximating $30,000,000 (9A-10A).*

8. All advances from the Special Trust Fund to Blair ceased upon the filing of the involuntary petition in bankruptcy (Pet. App. "A" at 13).

9. Blair interposed an answer to the involuntary petition in bankruptcy on October 9, 1970, denying the material allegations thereof, and requesting a trial by jury pursuant to Section 19 of the Act, 11 U.S.C. §42(1A). Thereafter, on November 2, 1970, Blair moved in the bankruptcy court for summary judgment dismissing the petition and Foley cross-moved for summary judgment adjudging Blair a bankrupt (6A-149A).

10. By decision dated April 13, 1971, the bankruptcy court denied Blair's motion, granted Foley's cross-motion and held, in part, that Blair's consent to the appointment of Mr. Scorese as Liquidator constituted the commission of the fifth act of bankruptcy under Section 3 of the Act (219A-221A).

11. On April 15, 1971, Blair filed a petition for an arrangement under Chapter XI, Section 321 of the Act, 11 U.S.C. §721 (Pet. App. "A" at 13). By reason thereof, the order of the bankruptcy court, dated April 27, 1971, adjudging Blair a bankrupt (236A-237A), stayed all ordinary

* Subsequent to April 15, 1971 and pursuant to the arrangement proposed in the Chapter XI proceedings initiated by Blair, the valid claims of all public customers of Blair have been satisfied and the securities described above have been delivered to customers entitled thereto.

bankruptcy proceedings pursuant to Chapters I-VII of the Act, subject to the order of the referee assigned to the Blair Chapter XI proceedings.

12. On May 7, 1971, Blair and the Liquidator, pursuant to Section 39c of the Act, 11 U.S.C. §67c, filed a petition for review of the order of the bankruptcy court dated April 27, 1971 (231A-238A). On May 18, 1971, after notice to all creditors of Blair and a hearing before the bankruptcy court, the referee entered an order pursuant to Section 325 of the Act, 11 U.S.C. §725, staying ordinary bankruptcy proceedings under Chapters I-VII of the Act (Pet. App. "A" at 14). In accordance therewith, Blair and the Liquidator have proceeded with the prosecution of the Chapter XI proceedings.

13. On May 26, 1971, Blair filed with the District Court its proposed arrangement with its creditors pursuant to Chapter XI of the Act.

14. On September 27, 1971, the bankruptcy court found that the proposed arrangement had been accepted in writing by the requisite majority in number and amount of creditors in accordance with Section 336(4) and 337 of the Act, 11 U.S.C. §§736(4) and 737.

15. On or about September 24, 1971, Foley moved in the bankruptcy court to dismiss the Blair Chapter XI proceedings on the grounds that (a) the filing of the debtor's Chapter XI petition had allegedly not been properly authorized by its board of directors; (b) the debtor's proposed arrangement was allegedly "illegal, void and incapable of being confirmed"; (c) the debtor allegedly could not be rehabilitated; and (d) the debtor had allegedly failed to move for confirmation promptly.

16. By order dated March 15, 1972, the District Court affirmed the order of the bankruptcy court dated April 27, 1971, which had sustained the involuntary petition in bankruptcy and adjudged Blair a bankrupt (239A-241A).

17. On December 11, 1972, the Court of Appeals reversed the District Court's order of March 15, 1972 with instructions to direct the referee to vacate the order of adjudication and dismiss the involuntary petition in bankruptcy (244A-245A). In its opinion, the Court of Appeals found that the bankruptcy court and the District Court had "erred in concluding that Blair had committed the fifth act of bankruptcy" (Pet. App. "A" at 14).

18. By order dated February 16, 1973, the bankruptcy court denied Foley's motion to dismiss the Blair Chapter XI proceedings.

19. On March 19, 1973, pursuant to Section 39c of the Act, Foley filed a petition for review of the aforesaid order of the bankruptcy court.

20. By order dated June 12, 1973, the District Court denied Foley's petition for review, affirmed the bankruptcy court, finding the "grounds argued by Foley for dismissal [of the Blair Chapter XI proceedings] to be frivolous and without merit or substance."

Summary of Argument

I. A. The question on appeal is moot, for any decision by the Court will have no effect on the proceedings in the bankruptcy court or upon the rights of the parties. Blair has filed a petition for an arrangement under Chapter XI, Section 321 of the Act and is subject to the jurisdiction of the bankruptcy court pursuant thereto. The bankruptcy

court, pursuant to Section 325 of Chapter XI of the Act, has stayed the administration of the Blair estate in ordinary bankruptcy proceedings under Chapters I-VII. In addition, Foley's motion to dismiss the Blair arrangement proceedings has been denied and confirmation of the debtor's proposed arrangement is imminent. Upon confirmation, the debtor will be discharged and the case, including the involuntary ordinary bankruptcy proceeding, will be dismissed. A determination of the question presented herein will not have any effect on the Chapter XI proceedings. Foley thus asks the Court to render an opinion on a hypothetical set of facts, namely, the administration of the Blair estate in ordinary bankruptcy proceedings when such an administration has been stayed and will not be revived. Accordingly, there is no controversy between the parties of "sufficient immediacy and reality" to warrant the exercise of jurisdiction by this Court. *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969).

B. The enactment of the Securities Investor Protection Act of 1970, 15 U.S.C. §§78aaa, *et seq.*, renders academic the issue on appeal insofar as financially distressed stockbrokers, such as Blair, are concerned. It is undisputed that Blair was insolvent in September of 1970 and that it would have fallen under the purview of said statute but for the prospective nature of the legislation. *Lohf* v. *Casey*, 330 F.Supp. 356 (D. Colo. 1971), *aff'd*, 446 F.2d 618 (10th Cir. 1972). Thus, the Securities Investor Protection Act makes certain that the issue before the Court will not arise again. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955).

II. A. The Liquidator in the case on appeal is not a receiver for he was not appointed by any court or pursuant

to any statute. *Ledbetter* v. *Farmers Bank & Trust Co.*, 142 F.2d 147, 150 (4th Cir. 1944). Since a receiver is not, without more, an agent, so an agent with broad powers such as the Liquidator, is not, without more, a receiver. The Liquidator was also not a trustee, for he did not have title to the debtor's property. Scott, The Law of Trusts, ch. 1, §8, at 78-79 (3d ed. 1967); Restatement of Trusts 2d, §§2 and 8 & Comment *a* (1959). The instant case differs essentially from *In re Bonnie Classics, Inc.*, 116 F. Supp. 646 (S.D.N.Y. 1953), which dealt with statutory trustees who were vested with title to the debtor's assets, who acquired possession thereof and whose appointment affected the rights of creditors.

B. The Liquidator, unlike a receiver or trustee, could not restrain Blair's creditors. The rights of Blair's creditors were not affected by the appointment of the Liquidator and such creditors could have proceeded to judgment against Blair in a court of competent jurisdiction and were not relegated to a *pro rata* distribution of the debtor's assets in a statutory or equity proceeding. Blair's creditors were therefore not hindered, delayed or defrauded by the Liquidator's appointment. *In re Ambrose Matthews & Co.*, 229 F. 309 (D.N.J. 1916), *aff'd*, 236 F. 539 (3d Cir. 1916).

III. A. The legislative history and statutory context of Section 3a do not reveal a congressional intent to include an agent authorized to liquidate a debtor's property within the accepted meaning of "receiver" or "trustee". The 1903, 1926 and 1938 amendments to Section 3a were primarily concerned with the statutory definition of "insolvency". See, *e.g.*, H.R. Rep. No. 877, 69th Cong., 1st Sess. 7 (1926). Until 1926, the statute required the appointment

of a receiver or trustee to be "under the laws of a State, or a Territory, or of the United States". This language was deleted in 1926 only because it was surplusage. The Senate bill, S. 1039, had retained the deleted language, 67 Cong. Rec. 6800 (1926), but, in conference, the words were subsequently stricken, the House Managers stating that the "difference consists merely in phraseology". H.R. Rep. No. 1257, 69th Cong., 1st Sess. 8 (1926). Accordingly, the amendment did not change the substantive law with respect to the definition of a receiver or trustee in the context of the statute. The 1938 amendment was adopted for the purpose of including both the bankruptcy and equity definitions of insolvency, thereby expanding the breadth of Section 3a(5) in order to reach "the widely prevalent abuse of collusive equity receiverships", formal court proceedings in which creditors' rights were being impaired. S. Rep. No. 1916, 75th Cong., 3d Sess. 12 (1938).

B. A comparison of Section 3a(5) with Sections 2a(21) and 69d shows that when Congress wanted to include a liquidating agent within the coverage of the Act, it considered it necessary to say so and knew how to do it. Section 2a(21) was added in 1938, 52 Stat. 844, the same time as the most recent amendment to Section 3a(5), and specifically refers to an agent authorized to liquidate a debtor's property. Section 69d, amended in 1952, also specifically refers to an agent authorized to liquidate a debtor's property, 66 Stat. 426, and was amended at that time for the express purpose of including such an agent within its coverage. H.R. Rep. No. 2320, 82d Cong., 2d Sess. 15 (1952).

IV. A. Congress has made a policy determination that an insolvent debtor cannot be subjected to involuntary bankruptcy "unless he has done * * * certain acts * * * concern-

ing his property" which prejudice the rights of his creditors. 1 Collier, Bankruptcy ¶3.03 at 403 (14th Ed. 1972). The Act does not prevent an insolvent debtor from dealing with his property, so long as he does not defraud or delay his creditors or prefer any one creditor over another creditor of the same class and does not impair the value of his estate. *Cook* v. *Tullis*, 85 U.S. (18 Wall.) 332, 340 (1874).

B. The Act should not be enlarged by judicial action in order to expand the acts of bankruptcy to include an event clearly excluded by Congress. *Maplecroft Mills* v. *Childs*, 226 F. 415, 419 (4th Cir. 1915). Bankruptcy "is not the only method available to a debtor for the adjustment of his legal relationship with his creditors * * *." *United States* v. *Kras*, —— U.S. ——, 93 S.Ct. 631, 638 (1973). Blair is in any event subject to the "exclusive jurisdiction" of the bankruptcy court by virtue of its pending arrangement proceedings. Section 311 of the Act, 11 U.S.C. §711. In construing Section 3a(5), the court below properly construed what Congress enacted and correctly interpreted the statute's legislative history.

ARGUMENT

I

The question presented is moot and the writ of certiorari should be dismissed.

The case before the Court is a wholly academic matter, for a resolution of the question presented can have no impact upon the proceedings under the Act involving Blair or the other litigants in this Court. Blair is presently subject to proceedings under Chapter XI of the Act. Whether or not Blair is adjudged a bankrupt under Section 3a(5) of the Act is irrelevant to the confirmation of its proposed

arrangement and the discharge granted thereby. Further, the adoption of the Securities Investor Protection Act of 1970, 15 U.S.C. §§78aaa *et seq.*, renders the issue presented herein moot with respect to financially distressed brokers or dealers who maintain accounts for public customers. Thus, Foley asks the Court to render an opinion upon an academic question.

A. The ordinary bankruptcy proceedings affecting Blair have been stayed and Blair's assets are being administered in accordance with the provisions of Chapter XI of the Bankruptcy Act.

Blair filed its petition for an arrangement under Section 321 of the Act. A Chapter XI petition filed pursuant to Section 321, however, does not act as a stay of adjudication or of the administration of a debtor's estate in ordinary bankruptcy proceedings under Chapters I-VII of the Act. Section 325 of the Act, 11 U.S.C. §725. Section 325 further provides that the court may, "upon application of the debtor and upon notice to all parties in interest, * * * grant a stay of adjudication or of the administration of the estate * * *." Subsequent to the filing of its Chapter XI petition, Blair promptly applied for the issuance of such a stay under Section 325. Blair served more than 28,000 notices of the application and hearing to be held in connection therewith upon all creditors and parties in interest. After a hearing before the bankruptcy court on May 12, 1971, Blair's application for a stay of administration of the estate in ordinary bankruptcy proceedings under Chapters I-VII was granted in an order dated May 18, 1971.

Thereafter, Blair filed its proposed arrangement which, in essence, provided for the satisfaction of all valid claims

of customers and the 25% cash payment of all allowed claims of general unsecured creditors. At a hearing held before the bankruptcy court on September 27, 1971, the court found that the creditors of Blair had accepted the proposed arrangement by the requisite majority in number and amount of allowed claims.

Confirmation of the arrangement proposed by Blair is imminent. The provisions of the arrangement have been partially consummated. The valid claims of Blair customers have been satisfied and securities having a market value of millions of dollars have been delivered to customers pursuant to orders of the bankruptcy court. Until recently, confirmation of the arrangement had been deferred because of the technical impediment represented by the Foley motion to dismiss the Blair arrangement proceedings. This impediment was removed by the order of the bankruptcy court denying Foley's motion and the affirmance of that order by the District Court on June 12, 1973. The Chapter XI proceedings will therefore be concluded within a short period of time.

Confirmation of Blair's arrangement will be binding upon all creditors in accordance with Section 367 of the Act, 11 U.S.C. §767. Upon confirmation, the case, including the suspended ordinary bankruptcy proceedings initiated by Foley, will be concluded and dismissed. Thus, the issue of whether or not Blair committed an act of bankruptcy under Section 3a(5) of the Act is of no significance. Indeed, the issue has been mooted by Blair's election to continue the prosecution of the Chapter XI proceedings and remain subject to the jurisdiction of the bankruptcy court and the provisions of the Act.

This Court has consistently held that it will not decide cases in which there is no controversy between the parties of "sufficient immediacy and reality" and where such decisions would merely resolve academic questions. *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969); *Hall* v. *Beals*, 396 U.S. 45 (1969); *St. Pierre* v. *United States*, 319 U.S. 41 (1943). Thus, in *Hall* v. *Beals*, *supra*, the Court dismissed the case before it as moot, reasoning that an amendment to the statute in question resulted in the matter's losing "its character as a present controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract opinions of law." 396 U.S. at 481. The Court expressly relied upon its previous holding in *Mills* v. *Green*, 159 U.S. 651 (1895), where it was held that:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, * * * an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence." 159 U.S. at 653.

A reversal of the judgment of the Court of Appeals herein would be of no effect in the present proceedings involving Blair and would not affect the rights of Foley. Petitioners, subordinated creditors of Blair, in protecting their rights, may utilize the same provisions of the Act as would be available if the ordinary bankruptcy proceed-

ings had not been stayed. Therefore, it is submitted that the question presented is not rooted in reality nor does it require resolution by this Court.

As stated by this Court in *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227 (1937):

> "A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot * * *. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests * * *. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." [citations omitted]. 300 U.S. at 240, 241.

Applying the foregoing reasoning to the case on appeal, the decision sought by Petitioners from this Court would merely relate to a hypothetical state of facts, namely, the administration of the Blair estate in ordinary bankruptcy proceedings under Chapters I-VII of the Act. In view of the posture of the Chapter XI proceedings, there will be no administration of Blair's estate under Chapters I-VII. Accordingly, Foley has not presented a justiciable controversy to be decided by the Court.

B. The enactment of the Securities Investor Protection Act of 1970 also renders academic the issue on appeal.

Petitioners state that there is a "public interest" in the Court's interpretation of Section 3a(5) of the Act (Petitioners' Brief at 23). Petitioners fail to make any reference to the Securities Investor Protection Act of 1970, 15

U.S.C. §§78aaa, *et seq.* ("SIPA"). Nevertheless, they have never disputed the fact that SIPA effectively resolves for the future the question presented herein insofar as stockbrokers are concerned.

The financial collapse of a broker or dealer such as Blair, since January 1, 1971, will subject it to liquidation proceedings pursuant to SIPA under the supervision of the Securities Investor Protection Corporation ("SIPC"), a nonprofit membership corporation established by SIPA. Section 5(b)(1)(A) of SIPA, 15 U.S.C. §78eee(b)(1)(A), expressly provides that, upon application of SIPC, a United States District Court may determine that customers of a broker-dealer are entitled to the benefits of the Securities Investor Protection Act if the broker-dealer:

> "(i) is insolvent within the meaning of Section 1(19) of the Bankruptcy Act, or is unable to meet its obligations as they mature, or (ii) has committed an act of bankruptcy within the meaning of Section 3 of the Bankruptcy Act, or (iii) is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such member has been appointed, or (iv) is not in compliance with applicable requirements under the 1934 Act or rules or regulations of the Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities, or (v) is unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules or regulations."

The filing by SIPC of an application pursuant to Section 5(a)(2) of SIPA, 15 U.S.C. §78eee(b)(2), vests the court with exclusive jurisdiction of the broker or dealer and its

property wherever located and supersedes any pending bankruptcy proceedings, among others. Section 5(b)(2) of SIPA, 15 U.S.C. §78eee(b)(2). Blair was insolvent within four months of the filing of the involuntary petition in bankruptcy herein. Accordingly, there is no question that Blair falls within the terms of the foregoing excerpt and that the benefits of SIPA would have been available to Blair's customers if SIPA were not prospective. See *Lohf* v. *Casey*, 330 F. Supp. 356 (D. Colo. 1971), *aff'd*, 446 F. 2d 618 (10th Cir. 1972); H. R. Rep. No. 1613, 91st Cong., 2d Sess. 14 (Oct. 21, 1970). Because of the foregoing, the case on appeal may be properly characterized as *sui generis*. A similar case will not arise again in the future. Consequently, a decision by this Court in this particular case would only resolve an abstract principle of law and not a real controversy.

In *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955), this Court held that when an issue no longer appears to be of substantial importance, a writ of certiorari should be dismissed as improvidently granted. There, the Court dismissed a writ of certiorari after it was clear that a recently enacted statute would assure that the issue could never arise again, reasoning as follows:

> "A federal question raised by a petitioner may be of substance in the sense that abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants." 349 U.S. at 74.

See also, *District of Columbia* v. *Sweeney*, 310 U.S. 631 (1940). The question presented to the Court is thus moot and of mere historical interest. Accordingly, the writ of certiorari should be dismissed.

II

A liquidating agent is not a "receiver" or "trustee" within the meaning of Section 3a(5) of the Bankruptcy Act and his appointment does not affect the rights of creditors.

Foley's conclusory arguments that the Liquidator had at least as much power as a receiver or trustee (Petitioners' Brief at 13) are without foundation in fact. Significantly, Foley avoids any discussion of the legal powers of a receiver or trustee. Foley's analysis of the Liquidator's powers merely focuses upon such powers in the abstract, with no consideration of the rights of Blair's creditors. Any valid analysis of the Liquidator's powers in the case on appeal, however, must take into consideration whether or not the Liquidator's appointment actually prejudiced the rights of Blair's creditors, as would be the case with the appointment of a receiver or trustee or the commission of any other act of bankruptcy under Section 3a of the Act.

A. The Liquidator is not a receiver or trustee.

The opinion of the Court of Appeals analyzed closely the legal meaning and significance of the terms "receiver" and "trustee" and found, *inter alia*, that the Liquidator in the case on appeal did not meet the usual requirements "essential to the status of a receiver, namely, appointment by a court" (Pet. App. "A" at 15). While Petitioners cavalierly disregard such a distinction, they do not dispute that the Liquidator was appointed pursuant to an agreement and that he was not appointed by a court or

pursuant to a statute. Petitioners further ignore the authorities and decisions, including those of this Court, which have described a receiver as follows:

> "A receiver is an indifferent person between parties, *appointed by the court* to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. [Citations omitted.] *He is an officer of the court*; his appointment is provisional. * * * The money in his hands is in *custodia legis* for whoever can make out a title to it. [Citations omitted.] *It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as conferred upon him by the order of his appointment and the course and practice of the court.*" [Emphasis supplied.]

Booth v. *Clark*, 58 U.S. (17 How.) 322, 331 (1855); *accord*, High, A Treatise on the Law of Receivers, ch. 1, §1, at 2-3 (4th ed. 1910). The foregoing substantiates the settled principle that a receiver is either court appointed or appointed pursuant to statute. Foley's counter-argument, based upon the inability "to locate" a statute specifically stating the same, is facetious (Petitioners' Brief at 16). It demonstrates the tenuousness of the instant appeal. Indeed, Foley's statement that a liquidating agent "would seem" to fall within the coverage of the statute underscores the weakness of Foley's argument.

Petitioners disregard and do not refute the established principle that a receiver "is the agent only of the court appointing him." *Ledbetter* v. *Farmers Bank & Trust Co.*, 142 F. 2d 147, 150 (4th Cir. 1944). In the *Ledbetter* case,

supra, the plaintiffs contended that a receiver appointed by a state court in a mortgage foreclosure proceeding acted as the agent and representative of the mortgagees in wrongfully dealing with the receivership property. Affirming the lower court's dismissal of the complaint, the Court of Appeals for the Fourth Circuit held that the receiver was not the agent of the mortgagees, but was the agent only of the court which had appointed him, reasoning as follows:

> "*It is well recognized that a receiver is the agent only of the court appointing him; he represents the court rather than the parties. He is custodian of property which is under the control of the court.* See 23 R.C.L.—Receivers §2, p. 7. The appointment of a receiver is a judicial act. It is not a matter of positive right, but rests in the sound legal discretion of the appointing judge. Suggestions as to the person to be appointed as receiver do not have the legal effect of making the receiver the agent of the party making the suggestion. [Citations omitted.] [The court then quoted this Court's definition of 'receiver' quoted above in *Booth* v. *Clark, supra*.] Though a receiver appointed by the court acts for all parties interested, he is not the agent of the parties in the sense that each or any of the parties is responsible for his acts. * * *" 142 F. 2d at 150. [Emphasis supplied.]

Thus, the Court of Appeals below correctly reasoned that, since a receiver is not, without more, an agent, so an agent with broad powers such as the Liquidator, is not, without more, a receiver (Pet. App. "A" at 16).

Without citing any authority whatsoever, Foley argues that the established "prerequisite of judicial appointment should be disregarded completely * * *" (Petitioners' Brief at 17). No sound reason is advanced why the

authorities and precedent relied upon by the Court of Appeals should be disregarded even though Foley concedes that the Liquidator was not court-appointed and, thus, cannot be deemed an officer of any court. As the Court of Appeals noted, the Liquidator was expressly described as "the true and lawful attorney and agent of and for [Blair]" by the terms of the power of attorney executed on September 21, 1970 (Pet. App. "A" at 13). He is and was the agent of the corporation. His appointment did not change the status of Blair or affect its creditors or stockholders.

In an attempt to show that the Liquidator is a receiver or trustee, Petitioners argue that the Liquidator never acted on behalf of Blair or its board of directors "as an agent normally would" (Petitioners' Brief at 9). To support this factually incorrect premise, they state that "all but one" of Blair's directors "resigned upon [the Liquidator's] appointment. * * *" (Petitioners' Brief at 9). Significantly, Petitioners do not and cannot support this contention with any facts, either in the record or elsewhere. In fact, the statement of affairs filed by Blair with the District Court in accordance with Section 324 of the Act states under oath that, as of September 29, 1970, the date upon which the involuntary petition in bankruptcy was filed herein, and four days after the appointment of the Liquidator, Blair had a total of eight directors. The debtor's statement of affairs was further supported by the examination of an officer of the debtor on September 15, 1971 before the referee in bankruptcy under Section 7a(10) of the Act.

Petitioners emphasize that the Liquidator was empowered to sell certain of Blair's assets, but disregard the fact

that Blair retained title to all of its property. The Liquidator did not acquire title to Blair's property, and could not transfer title thereto without the consent of Blair. By reason of his lack of title to the property of Blair, the Liquidator lacked an element essential to the normal concept of trusteeship (Pet. App. "A" at 16).

> "An agent does not ordinarily have title to the property of the principal, although he may be entrusted with possession and although he may have power to pass title; *but a trustee has title to the trust property.*" [Emphasis supplied.]

Scott, The Law of Trusts, ch. 1, §8, at 78-79 (3rd ed. 1967); see *Handy* v. *C.I.T. Corp.*, 291 Mass. 157, 197 N.E. 64 (1935); Restatement of Trusts 2d, §§2 and 8 & Comment *a* (1959).

This Court has also stated that

> "[a] trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another." *Taylor* v. *Davis' Adm'x.*, 110 U.S. 330, 334 (1884).

Further, the Liquidator, as Blair's agent, could subject Blair to liability for his acts, whereas a trustee would ordinarily not have such power. Scott, The Law of Trusts, ch. 1, §8, at 74 (3rd ed. 1967).

Foley has not, and indeed cannot, point to any document which vested the Liquidator with title to or even possession of the property of Blair. Accordingly, Foley's heavy reliance upon *In re Bonnie Classics Inc.*, 116 F. Supp.

646 (S.D.N.Y. 1953) is misplaced. The *Bonnie Classics* decision is distinguishable from the instant appeal. In that case, the trustees, who had title to the debtor's assets, were appointed pursuant to a statute of New York State. The court stated the issue in that case to be as follows:

> "Does the filing of a certificate of dissolution of a corporation, *pursuant to §105 of the New York Stock Corporation Law*, when the corporation is insolvent, constitute an act of bankruptcy under §3, sub. a(5) of the Bankruptcy Act, 11 U.S.C.A. §21, sub. a(5)?" 116 F. Supp. at 646, 647. [Emphasis supplied.]

Bonnie Classics thus presented a case of trustees created by statute, who therefore fell within the established and accepted characterization of "trustee" set forth in Section 3a(5) of the Act. In contrast to *Bonnie Classics*, it is uncontroverted that the Liquidator was not appointed pursuant to any statute and that he was never vested with title to any of the debtor's assets.

In its articulate and reasoned opinion, the district court in *Bonnie Classics* discussed the nature of the duties imposed upon the directors of a corporation after the filing of a certificate for voluntary dissolution under §105(7) of the former New York Stock Corporation Law. Noting that a director of a corporation is a fiduciary, whether the corporation is solvent or insolvent, the court explained that the filing of a certificate for the voluntary dissolution of a corporation creates significant changes in both the status and the power of the corporation's directors.

> "The statute in express terms refers to them as 'trustees'. They become, as the New York authorities variously refer to them, 'trustees in liquidation', 'trustees

> of the dissolved corporation's assets', 'trustees of its assets' or 'trustees for the benefit of creditors of the corporation'. *In the instance of a corporation not in dissolution, the legal title to all its assets is in the corporation. In the case of a corporation in dissolution, the New York courts have ruled that the legal title to its property was vested in the directors as trustees for creditors and stockholders. Under this conception, it has been held that there is no property of the corporation against which creditors may proceed to enforce judgment obtained against the corporation and they are relegated to pro rata distribution of assets in the dissolution proceedings.*" 116 F. Supp. at 647, 648. [Emphasis supplied; citations omitted.]

Clearly, the court in *Bonnie Classics* relied heavily upon the transfer of title to the corporation's assets to the directors of the corporation, beyond the reach of creditors, with the result that under state law, the directors were "trustees" within the meaning of Section 3a(5) of the Act.

In contrast to the *Bonnie Classics* case, *supra*, Foley, however, is unable to bring the case on appeal within the rationale of *Bonnie Classics*. He is unable to cite any provision in the agreement of September 21, 1970 (34A-65A) which conveys to the Liquidator title to the assets of Blair or vests him with any of the other distinguishing powers of a trustee. Foley also disregards the provision of the liquidation agreement of September 21, 1970, which provides for the termination of the Liquidator's appointment at the option of Blair or its stockholders (44A-45A).

Foley ignores the essence of the *Bonnie Classics* case, as distinguished from the case at bar. Unlike the corporation which has filed a certificate for voluntary dissolu-

tion in New York, described in *Bonnie Classics, supra*, subsequent to the Liquidator's appointment, creditors of Blair could have proceeded against the property and assets of the debtor to enforce any judgment obtained against that corporation. Blair's creditors retained all rights to prosecute their claims and proceed against Blair without regard to the appointment of the liquidating agent. Unlike creditors in the New York dissolution proceedings described in *Bonnie Classics*, creditors of Blair were not "relegated to *pro rata* distribution of assets in the dissolution proceedings" because of the appointment of the Liquidator.

Foley erroneously places great emphasis upon the following excerpt from *Bonnie Classics, supra*, quoted in the dissenting opinion in the Court of Appeals:

> "The method adopted to effect the *transfer* is immaterial. * * * Any action by one who is insolvent which effectively causes the transfer of his property to another for final liquidation purposes appoints the transferee a 'trustee to take charge of his property' under §3, sub. a(5)." 116 Supp. at 648. [Emphasis supplied.]

The key word in the foregoing excerpt is "transfer." The court in *Bonnie Classics* was focusing upon a "transfer" of the debtor's property. A transfer of title and possession of the debtor corporation's property had been effected in *Bonnie Classics*. No such transfer of Blair's assets took place when the Liquidator was appointed. Blair has always retained title to and possession of its assets.

Foley has cited no provision in the liquidation agreement of September 21, 1970 (34A-65A) which gives the

Liquidator exclusive possession or control of the debtor's property, as is argued (Petitioners' Brief at 13). Further, the liquidation agreement is devoid of any provision which divests Blair's officers and directors of possession or control of the corporation's assets. In fact, the officers of Blair continue to be involved in its operations with the Liquidator. The distinctions between Blair and *Bonnie Classics* were even recognized by Circuit Judge Timbers, in his dissenting opinion below (Pet. App. "A" at 22).

The Court of Appeals rejected as unpersuasive the decision in *In re R. V. Smith Co.*, 38 F. Supp. 57 (W.D. Okla. 1941) (Pet. App. "A" at 17). Relying upon a statement of this Court taken out of context (Petitioners' Brief at 22), and no more, Foley contends that the *Smith* case, *supra*, is controlling in the case on appeal. The *Smith* case dealt only obliquely with the issue now before this Court. There, the petitioning creditors alleged that the debtor's consent to the appointment of "liquidating trustees" constituted an assignment for the benefit of creditors, the fourth act of bankruptcy. Section 3a(4) of the Act, 11 U.S.C. §21a(4). The court noted initially it was "not at all satisfied that, even under the Act and under the construction that has been placed on similar acts by Federal Courts, the instruments executed * * * did not constitute an assignment for the benefit of creditors," although title was not expressly conveyed to the liquidating trustees. 38 F. Supp. at 62. But see *In re Ambrose Matthews & Co.*, 229 F. 309 (D.N.J. 1916), *aff'd*, 236 F. 539 (3d Cir. 1916). While the court in the *Smith* case merely stated that the alleged bankrupt had committed the fifth act of bankruptcy, it did not indicate whether or not any defense was inter-

posed to the alleged commission of such act. Moreover, the court gave no consideration whatsoever to the derivation of Section 3a(5) or the legislative history and purpose underlying the adoption of that section. Accordingly, it is submitted that the Court of Appeals properly rejected the *Smith* case as unpersuasive.

B. The Liquidator could not affect the rights of Blair's creditors.

The true significance of the Liquidator's appointment upon the creditors of Blair, if any, can best be demonstrated by a comparison between the consequences to creditors after his appointment and the consequences to creditors after the fourth and fifth acts of bankruptcy have been committed by a debtor. The fourth act of bankruptcy, which entails the debtor's making a general assignment for the benefit of his creditors, and the fifth act of bankruptcy, which entails a receivership or trusteeship, have the effect of preventing creditors from pursuing their ordinary remedies against the debtor. When either the fourth or fifth acts of bankruptcy are committed, creditors are forced to deal with the debtor's assignee, receiver or trustee, and must share in the debtor's assets on a *pro rata* basis. In contrast, after the appointment of the Liquidator, Blair's creditors were not adversely affected.* Creditors could proceed with the prosecution of actions against Blair and were not relegated to any particular forum as a court of exclusive jurisdiction. The appointment of the

* The appointment of the Liquidator had the converse effect, as it carried with it the anticipated infusion of millions of dollars from the Special Trust Fund of the New York Stock Exchange for customer assistance. To date, the Fund has advanced $20.4 million in connection with claims of customers of Blair.

Liquidator did not change the posture of Blair and its creditors or their respective rights.

By adoption of Section 3 of the Act, Congress determined that creditors of a debtor may not be bound by that debtor's election to make an assignment for the benefit of creditors or his subjecting himself to a receivership or trusteeship other than pursuant to the Bankruptcy Act. By virtue of Section 3, creditors could compel involuntary proceedings under the Act, provided the debtor committed an act of bankruptcy. *Globe Ins. Co.* v. *Cleveland Ins. Co.*, 10 Fed. Cas. 488, 492 (No. 5486) (C.C.N.D. Ohio 1876), *appeal dismissed*, 98 U.S. 366 (1879). In the case on appeal, however, the appointment of the Liquidator did not deprive Blair's creditors, including Foley, of such a right. Consequently, if Blair were a party to the heinous acts implied by Foley, Foley would be in a position to take appropriate action. An appointment of an agent to liquidate a debtor's property is thus not a "broad highway for fraud and evasion of the rights of creditors in the liquidation of insolvent companies," as stated by Foley (Petitioners' Brief at 23).

Significantly, Foley fails to distinguish *In re Ambrose Matthews & Co.*, 229 F. 309 (D.N.J. 1916), *aff'd*, 236 F. 539 (3d Cir. 1916), cited by the Court of Appeals (Pet. App. "A" at 17). There, the court held that a corporate debtor which merely grants a power of attorney for the purpose of winding up its affairs has not made an assignment for the benefit of its creditors and has not therefore committed the fourth act of bankruptcy. *Ambrose Matthews* presented a factual situation strikingly similar to the instant

case. The reasoning of that case should be dispositive of the case on appeal.

> "It is necessary primarily, therefore, to construe this instrument [i.e. the power of attorney] and to ascertain its legal effect as respects the property of the alleged bankrupt. It does not contain any words of conveyance, assignment or transfer. It merely appoints two persons as 'agents, attorneys and trustees' for the stockholders, directors and corporation 'for the purpose of winding up the affairs' of the corporation. It empowers them to collect the corporation's outstanding accounts, to pay its debts, to prosecute and defend suits for and against it, to convey and dispose of its property, and after payment of its debts to divide its assets among the stockholders; also, to prepare the necessary papers for the dissolution of the corporation immediately after its accounts have been settled; and, generally, it sought in terms to confer upon them all of the powers and to impose all of the liabilities of a board of directors in winding up the affairs of a corporation upon dissolution. It seems entirely clear that it conferred no title whatever to any of the corporation's property upon the trustees. Its effect was merely to clothe the trustees with certain powers regarding the disposition of the corporation's assets and the distribution of the same among its creditors and stockholders. Nor can I find that there was any intent on the part of the alleged bankrupt to confer title upon the trustees. Each of the latter were attorneys at law, and the purpose of the instrument was that they, who were presumably better qualified, rather than the directors, should wind up the affairs of the corporation. *As the instrument brought about no change in the title to the property, either absolute or conditional, nothing was conveyed or transferred by it, and it could not hinder, delay or*

defraud creditors, because any creditor could proceed to satisfy his claim from the corporation's property to the same extent as though the instrument did not exist." 229 F. at 310. [Emphasis supplied.]

The foregoing is directly applicable to the instant case, for, if the debtor's granting of a power of attorney does not constitute the fourth act of bankruptcy, then it should not constitute the fifth act, provided that the rights of creditors are in no way affected thereby. The court below properly recognized the significance of this consideration when it rejected Foley's contentions (Pet. App. "A" at 20, 21).

Consistent with the authorities cited herein, the distinctions between the Liquidator in the case on appeal and a "receiver" or "trustee" within the meaning of Section 3a(5) of the Act are graphically demonstrated in the following two tables:

TABLE 1

INCIDENTS OF LEGAL STATUS

	Liquidator	*Receiver*	*Trustee*
Title to Debtor's Assets	No	No	Yes
Statutory Appointment	No	Yes	Sometimes
Court Appointment	No	Yes	Sometimes
Agency Relationship with Debtor	Yes	No	No

TABLE 2

ABILITY TO AFFECT RIGHTS OF CREDITORS

	Liquidator	*Receiver*	*Trustee*
Power to Stay Creditors from Proceeding Against Assets of Debtor in Any Court	No	Yes	Yes
Power to Force Creditors to Share in *Pro Rata* Distribution of Debtor's Assets	No	Yes	Yes

The Court of Appeals recognized and clearly stated how the Liquidator's powers differed essentially from those of a receiver or trustee within the context of Section 3a(5) of the Act. Foley, on the other hand, makes constant reference to the powers of a receiver or trustee, but makes no effort to define these powers in their statutory context. In contrast to Foley's reasoning, the rationale of the Court of Appeals is legally and logically well founded and should be affirmed.

III

The legislative history and statutory context of Section 3a(5) of the Bankruptcy Act demonstrate that a liquidating agent is not a "receiver" or "trustee."

The legislative history and statutory context of Section 3a(5) of the Act do not reveal a congressional intent to include a liquidating agent within the accepted meaning of "receiver" or "trustee." No reference is made to an agent authorized to liquidate property of an alleged bankrupt in any of the relevant legislative history. Foley fails to cite any such reference.

Foley's distorted interpretation of the pertinent legislative history is predicated exclusively on the self-constructed premise or "rule as to paramount and exclusive jurisdiction of liquidations of insolvent companies under the Bankruptcy Act * * *" (Petitioners' Brief at 4). The only authority cited by Foley for this erroneous premise is this Court's decision in *In re Watts & Sachs*, 190 U.S. 1 (1903). It was held in that case, however, that "the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations apply-

ing to be wound up *under state statutes.*" [Emphasis supplied.] The Court did not state that bankruptcy proceedings constituted the exclusive means for the liquidation and winding up of the affairs of an insolvent debtor or that such proceedings could be imposed in the absence of the commission of an act of bankruptcy. The crucial issue in the case at bar is not the supremacy of the Bankruptcy Act, but when the provisions of the Act may be imposed upon a debtor. Foley failed to establish that Blair committed an act of bankruptcy within the context of Section 3 of the Act. To cure that failure, Foley now requests that the Court judicially enlarge the statute.

Unlike the case on appeal, the Court in *Watts, supra,* was construing the predecessor to Section 3a(5), which provided that an act of bankruptcy would exist if a person "being insolvent, applied for a receiver or trustee for his property or because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory or of the United States." The receiver in that case had been appointed by a state court prior to the commencement of the bankruptcy proceedings. As a result, the case is of no significance herein, as the Liquidator of Blair was not appointed pursuant to statute or any judicial proceeding.

A. The Legislative History of Section 3a(5)

1. The Bankruptcy Act of 1898 and Its 1903 Amendment

The Court of Appeals noted that the present Section 3a(5) has its derivation in the Bankruptcy Act of 1898, ch. 541, §1 *et seq.*, 30 Stat. 545. In that statute, the appointment of a receiver or a trustee was not deemed to

be an act of bankruptcy, but several courts nevertheless treated such an appointment as the equivalent to the general assignment for the benefit of creditors, thereby constituting the commission of the fourth act of bankruptcy. *Scheuer* v. *Smith & Montgomery Book & Stationery Co.*, 112 F. 407 (5th Cir. 1901). The majority of courts, however, ruled otherwise. *In re Burrell*, 123 F. 414 (2d Cir. 1903).

In order to reconcile these conflicting decisions, Congress amended the fourth act of bankruptcy in 1903 to provide that an act of bankruptcy was committed if the alleged bankrupt "* * * made a general assignment for the benefit of creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency, a receiver or trustee had been put in charge of his property *under the laws of a State, or a Territory, or of the United States.*" Act of February 5, 1903, 32 Stat. 797. [Emphasis supplied.] Thus, the 1903 statutory amendment created an additional act of bankruptcy intended to cover those cases where a receiver or trustee was appointed pursuant to a statute or judicial proceeding.

While the 1903 amendment was intended by Congress to expand the coverage of Section 3a(4), a number of courts limited the effect of the amendment by construing the term "insolvency" in accordance with the narrow "bankruptcy" definition set forth in Section 1(19) of the Act. See, *e.g.*, *In re Wm. S. Butler & Co.*, 207 F. 705 (1st Cir. 1913), *cert. denied*, 231 U.S. 752 (1913). These narrow interpretations of the statute led to an additional amendment to Section 3a in 1926, thereby creating a fifth act of bankruptcy.

2. *The 1926 Amendment*

The Court of Appeals noted that the 1926 amendment to Section 3a was merely intended to clarify the term "insolvency" contained therein and its application (Pet. App. "A" at 18). First, Congress deleted the reference to receivers and trustees in the fourth act of bankruptcy and established a new act, Section 3a(5), which expressly referred to receivers and trustees. The new provision provided that an act of bankruptcy would be committed by the debtor if, "* * * while insolvent, a receiver or trustee had been appointed, or put in charge of his property." 44 Stat. 663. The amendment was made for the purpose of removing the distinction between voluntary and involuntary receivership proceedings, but also for the purpose of eliminating any inquiry into the causation of such proceedings. 1 Collier, Bankruptcy, ¶3.501 at 495 (14th Ed. 1972). Indeed, the House Committee on the Judiciary analyzed the amendment to Section 3 of the Act, stating the reasons for the change as follows:

> "Under judicial interpretation, the existing provision of the law has been held to mean that insolvency must actually be alleged in a petition for the appointment of a receiver, and a receiver must have been appointed because of insolvency, in order to become an act of bankruptcy. Under the amendment the appointment of a receiver for a debtor who is in fact insolvent, is in itself an act of bankruptcy, even though such insolvency was not directly alleged in the petition asking for a receiver."

H.R. Rep. No. 877, 69th Cong., 1st Sess. 7 (1926); see H.R. Rep. No. 695, 69th Cong., 1st Sess. 4 (1926); Colin, An Analysis of the 1926 Amendments to the Bankruptcy Act, 26 Colum. L. Rev. 789, 792 (1926); and McLaughlin,

Amendment of the Bankruptcy Act, 40 Harv. L. Rev. 341, 366-68 (1927).

Thus, the 1926 amendment to Section 3 of the Act was intended to obviate the contention that the appointment of a receiver would constitute an act of bankruptcy only if a receiver was appointed "because of insolvency." The congressional analysis of the statutory amendments indicates that no further substantive change was intended to be effected in Section 3. Foley, however, attaches an unfounded significance to the deletion by Congress of the words "under the laws of a State, of a Territory, or of the United States," as did the dissenting opinion in the Court of Appeals. Foley studiously avoids any reference to the Congressional Record, for in fact, the Senate bill, S. 1039, retained the deleted language, 67 Cong. Rec. 6800 (1926), but, in conference, the words were subsequently stricken, the House managers stating that the "difference [between the Senate and House bills] consists merely in phraseology." H.R. Rep. No. 1257, 69th Cong., 1st Sess. 8 (1926). By reason of the foregoing, the dissenting opinion in the Court of Appeals recognized "that the principal focus of the drafters of the amendment was on remedying an ambiguity regarding the preliminary requirement of insolvency, and that the elimination of the necessity of formal appointment was said to be simply a matter of change of phraseology * * *." (Pet. App. "A" at 23). Hearings in the House of Representatives further demonstrate that the deletion of the quoted language was not meant to effect a substantive change. See Hearings Pursuant to H. Res. 353 on Revision of the Bankruptcy Law Before the House Comm. on the Judiciary, 68th Cong., 2d Sess., ser. 51 at

38-39 (1925); Hearings on H.R. 5521 and H.R. 8119 Before the House Comm. on the Judiciary, 69th Cong., 1st Sess., ser. 4, at 17 (1926).

The deleted language was undoubtedly surplusage, for a receiver would necessarily be appoint to take charge of a debtor's property "under the laws of a State, of a Territory, or of the United States." Similarly, a trustee would be so appointed or else would be an assignee for the benefit of creditors under the fourth act of bankruptcy. Of course, if an insolvent debtor had appointed the trustee otherwise than for the benefit of all its creditors, the transaction might be a fraudulent conveyance under the first act of bankruptcy or a preferential transfer under the second. The elimination of the foregoing language, however, cannot be deemed the repeal of the established substantive requirements as to a receiver or trustee within the purview of the Act. Foley has offered no authority that Congress meant the terms "receiver" or "trustee" in Section 3a(5) to include a person who did not have all of the accepted attributes of these officers.

3. The 1938 Amendment

Because some courts continued to require a showing of insolvency in the bankruptcy sense after the 1926 amendment, Congress further amended Section 3a(5) in 1938 to read in its present form, which includes both the bankruptcy and equity definitions of insolvency, stated alternatively. 1 Collier, Bankruptcy ¶3.501 at 496, 497 (14th Ed. 1972); 52 Stat. 844-845. The Senate Report emphasized that the purpose of the amendment was to expand the scope of the fifth act of bankruptcy "in order to reach the widely prevalent abuse of collusive equity receiverships," which af-

fected the rights of creditors. S. Rep. No. 1916, 75th Cong., 3d Sess. 12 (1938); see also H.R. Rep. No. 1409, 75th Cong., 1st Sess. 6 (1937), where the House Report states that the "amendment does not affect those equity receiverships which are legitimately instituted and prosecuted to preserve the assets" of a debtor. Again, Foley cites no authority whatsoever which would even tend to show that Congress meant to extend the meaning of the words "receiver" or "trustee" so as to include a liquidating agent. The equity receiverships to which Congress had directed its intention involved judicially appointed receivers of purportedly solvent enterprises which were unable to pay their debts as they matured and not agents authorized to liquidate or manage the business and properties of the debtor pursuant to private agreement.

The collusive equity receiverships existing prior to the adoption of the 1938 amendment were well known to the legislators. See, *e.g.*, *First National Bank* v. *Flershem*, 290 U.S. 504 (1934). While it is not disputed that the amendment of Section 3a(5) was intended to cure the evils inherent in the friendly equity receiverships, had Congress intended to expand the scope of the words "receiver" or "trustee," an appropriate amendment would have been made, as was done in connection with Sections 2a(21) and 69d. The Act does not state that the appointment of an agent authorized to liquidate the property of an alleged bankrupt is an act of bankruptcy. Foley has failed to and is unable to demonstrate the contrary or even the proposal of any amendment to the Act to effect the same. The Act does not make the appointment of such an agent the commission of an act of bankruptcy and there is in fact no authority to the effect that Congress ever intended to broaden Section 3 of the Act to the extent argued by Foley.

B. The Statutory Context of Section 3a(5)

Further evidence that Congress never intended the words "receiver" or "trustee" to mean a liquidating agent can be found by comparing Section 3a(5) with Sections 2a (21) and 69d of the Act. Section 2a(21) authorizes the bankruptcy court to "[r]equire receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property" to deliver the property in their possession or control to a representative of the bankruptcy court. Section 2a(21) was added in 1938 at the same time Section 3a(5) was amended. 52 Stat. 844. As the court below noted, "when the draftsmen desired to cover [the liquidating] agent, they considered it necessary to say so and knew how to do it." (Pet. App. "A" at 19). Amendments to Sections 2a(21) and 3a(5) were under consideration when the Chandler Act was before Congress in 1938. While the Chandler Act of 1938 did amend Section 2a(21) so as to include specifically the liquidating agent or person appointed for the purpose of liquidating a debtor's assets, no such reference can be found in Section 3a(5).

Congress also amended Section 69d of the Act in 1952 so as to provide that upon the filing of a petition, "a receiver or trustee, appointed in proceedings not under this Act, of any of the property of a bankrupt, an assignee for the benefit of creditors of a bankrupt, or an agent authorized to take possession of or to liquidate any of the property of a bankrupt" shall be accountable to the bankruptcy court for action taken after the filing of the petition, shall file a schedule of assets and liabilities, shall make a sworn statement of his administration of the estate, and shall not make

any disbursements or take other administrative action without authorization from the bankruptcy court. 66 Stat. 426. As explained by the House Committee, the 1952 amendment to Section 69d was made for the express purpose of including assignees for the benefit of creditors and liquidating agents within its coverage:

> "[The amendment] conforms the scope of Section 69d of the Act to that of Section 2a(21). Section 2a(21) gives the court jurisdiction to require receivers or trustees, appointed in proceedings not under the Act, as well as assignees for the benefit of creditors and agents authorized to take possession of or to liquidate a person's property, to deliver the property in their possession or under their control to a receiver or trustee appointed under the Act. Section 69d, spelling out that power, requires a receiver or trustee, not appointed under the Act, of any property of the bankrupt, to account to the bankruptcy court, *but does not include the assignee and agent. The bill adds the necessary language and clarification.*" [Emphasis supplied.]

H.R. Rep. No. 2320, 82d Cong., 2d Sess. 15 (1952). Thus, Congress demonstrated again that a liquidating agent was not the equivalent of a "receiver" or "trustee". When Congress thought it necessary to bring a liquidating agent within the coverage of the statute, it made appropriate amendments thereto. Significantly, however, Congress neither made nor proposed any such amendment for Section 3a(5).

C. Foley has cited no valid authority for the proposition that the Liquidator was a receiver or trustee.

Foley cites several cases for the purpose of demonstrating that the Liquidator was the equivalent of a receiver or trustee within the meaning of Section 3a(5) of the Act.

Analysis of Foley's purported authorities readily discloses that they are erroneously cited and are of no persuasive value.

Blum Bros. v. *Girard Nat'l Bank*, 248 Pa. 148, 93 A. 940 (1915), *Hannon* v. *Mechanics Bldg. & Loan Ass'n of Spartanburg*, 177 S.C. 153, 130 S.E. 873 (1935) and *Jennings Sewer Dist. of St. Louis County* v. *Pitcain*, 238 Mo. App. 704, 187 S.W. 2d 750 (1950) are cited to show that a receiver has no title to an insolvent debtor's property (Petitioners' Brief at 20). Apparently, Foley contends that since the Liquidator has no title, he is therefore the equivalent of a receiver. The three cases cited, however, actually underscore the distinction between the Liquidator and a receiver. In the *Blum* case, *supra*, while it was held that a receiver does not acquire legal title to the debtor's assets, the receiver in question was also held to be "clothed with a kind of equitable title to be worked out under the order and direction of the *appointing court.*" 93 A. at 941. [Emphasis supplied.] Thus, unlike the Liquidator in the case on appeal, the receiver there was court-appointed.

Similarly, in the *Hannon* case, *supra*, the receiver was court-appointed and the court emphasized that it, not the insolvent debtor with title, had the right to dispose of the debtor's property, in contrast to the instant case. The *Jennings* case, *supra*, also dealt with a court-appointed receiver, as expressly conceded by Foley (Petitioners' Brief at 19). Indeed, Foley notes that the receiver in that case had "power to act under [the court's] direction." *Id.*

Foley cites *Marvin* v. *Brooks*, 94 N.Y. 71 (1883) apparently for the proposition that an "agent in possession of

property, which is the subject of his agency has been held to be a quasi trustee. * * *" (Petitioners' Brief at 19). Obviously, an agent owes a fiduciary duty to his principal, but the *Marvin* case does not shed any light on the issue before this Court. The case is not authority for the proposition that an agent authorized to liquidate any of the property of an alleged bankrupt is a trustee.

Respondents have never contended that the Liquidator's title is determinative of the issue on appeal. Accordingly, *Hayden Plan Co.* v. *Wood*, 97 Cal. App. 1, 275 P. 248 (1929) and *Gittings* v. *Morris*, 156 Md. 565, 144 A. 836 (1929), cited by Foley (Petitioners' Brief at 11), are not apposite. *McMullin* v. *Keogh-Doyle Meat Co.*, 96 Colo. 298, 42 P.2d 463 (1935) is also not on point, for it expressly dealt with a general assignment under the fourth act of bankruptcy set forth in Section 3a(4) of the Act and involved a transfer of the debtor's assets, a wholly different case from the one on appeal.

Foley cites *In re International Coal Min. Co.*, 143 F. 665 (E.D. Pa. 1906) and *Fish* v. *East*, 114 F.2d 177 (10th Cir. 1940) for the proposition that the manner of the Liquidator's appointment is not relevant (Petitioners' Brief at 17, 18). The *International Coal* case dealt with the turnover by an insolvent debtor of his assets to the local sheriff, who was a court-appointed officer and who received the assets pursuant to a court order. Similarly, the insolvent debtor's turnover of assets in *Fish* v. *East, supra,* was made to the trustee in bankruptcy of the debtor's parent corporation pursuant to court order. Both of the aforementioned cases are easily distinguishable, for the debtors transferred their assets to court-appointed officers who

were subject to the jurisdiction of a court and who could affect the rights of the debtors' creditors.

Foley apparently cites *In re Electric Supply Co.*, 175 F. 612 (S.D. Ga. 1909) by mistake (Petitioners' Brief at 14, 15). Although the case is cited properly for the proposition that the appointment of a receiver is harmful to the rights of creditors, the court in that case discussed briefly the consequences to creditors of the appointment of a receiver by a state court:

> "* * * [T]he provisions of the bankrupt law would become operative, and *the court of another jurisdiction would have no right to sequester the property and restrain creditors otherwise entitled to proceed in the bankruptcy court.*" 175 F. at 618. [Emphasis supplied.]

The foregoing excerpt underscores how creditors would be prejudiced by the appointment of a receiver within the meaning of Section 3a(5) of the Act. As previously demonstrated, the Liquidator of Blair did not have the power, however, to stay any of the debtor's creditors from proceeding to judgment or from filing an involuntary petition in bankruptcy against it.

Petitioners have cited no valid authority to support their tenuous position. Authorities which they cite actually support the decision of the court below. Other cases cited are inapposite. Accordingly, the Court of Appeals correctly held that the Liquidator was not a "receiver" or "trustee" within the meaning of Section 3a(5) of the Act.

IV

Section 3a(5) of the Bankruptcy Act is specific and need not be judicially enlarged.

Foley states that Blair sought "to avoid the paramount and exclusive jurisdiction of the Bankruptcy Courts" by agreeing to the appointment of the Liquidator (Petitioners' Brief at 23). The Court of Appeals noted (Pet. App. "A" at 20) that Foley's purported "policy" arguments disregard the act of bankruptcy requirement set forth in Section 3 of the Act, as well as the legal significance of the terms "receiver" and "trustee" set forth in Section 3a(5). In essence, Foley contends that the appointment of the Liquidator should constitute an act of bankruptcy, despite the fact that Congress did not specify an agent authorized to liquidate a debtor's property in Section 3a(5), but did do so in Sections 2a(21) and 69d of the Act.

Unless included within Section 3a of the Act, no action by an insolvent debtor can sustain an involuntary bankruptcy proceeding. 1 Collier, Bankruptcy ¶3.03 at 403 (14th Ed. 1972). Congress has thus made a policy determination that a debtor cannot be subjected to involuntary bankruptcy "unless he has done * * * certain acts * * * concerning his property" which prejudice the rights of his creditors. 1 Collier, *supra;* see Treiman, Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law, 52 Harv. L. Rev. 189, 201 (1938); Note, "Acts of Bankruptcy" in Perspective, 67 Harv. L. Rev. 500, 503 (1954). The Court of Appeals also noted this Court's explanation of the act of bankruptcy requirement in *Cook* v. *Tullis,* 85 U.S. (18 Wall.) 332, 340 (1874).

> "There is nothing in the Bankruptcy Act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leaves his estate in as good plight and condition as previously."

Foley has never proved and is in fact unable to prove any fraudulent purpose or activity on the part of the Liquidator in his administration of the Blair estate. Further, of the approximately 28,000 other Blair creditors, not one ever joined Foley in the prosecution of the involuntary petition in bankruptcy or supported the position of Foley.

The Bankruptcy Act should not be enlarged by judicial fiat in order to include a particular set of facts which may appear to be analogous to a specific act of bankruptcy, but which was manifestly excluded by Congress. As one court has held:

> "[T]his statute (while remedial) should be construed strictly * * *. In other words, its scope should not be enlarged so as to include transactions that may appear to be analogous but are obviously not contemplated by the statute. A court of bankruptcy has no power to extend the Bankruptcy Act * * *."

Maplecroft Mills v. *Childs*, 226 F. 415, 419 (4th Cir. 1915). Moreover, it is established that "when acts of bankruptcy

are classified * * * it is not the province of the court to enlarge the classification * * *." *In re Empire Metallic Bedstead Co.*, 98 F. 981, 982 (2d Cir. 1899).

Foley suggests that the appointment of the Liquidator constituted an abridgement of the rights of Blair's creditors (Petitioners' Brief at 8), but Foley is silent as to how the rights of Blair's creditors were affected after the Liquidator's appointment. As stated by the Court of Appeals, Blair's creditors were not prevented from alleging any other act of bankruptcy, such as a fraudulent conveyance, a preferential transfer or the debtor's failure to vacate or discharge a lien, in order to subject Blair to involuntary bankruptcy during the Liquidator's tenure (Pet. App. "A" at 21). In fact, Foley purported to allege two other acts of bankruptcy* in the involuntary petition (27A-28A), but "no serious attempt was made to support [them] before the referee, in the district court or [in the Court of Appeals]" (Pet. App. "A" at 14).

In contending that the holding of the court below would deprive the bankruptcy court of jurisdiction over the Blair estate (Petitioners' Brief at 8), Foley ignores the facts of the case on appeal. First, as stated, Blair's creditors were never prevented from alleging any other act of bankruptcy in order to subject Blair to the jurisdiction of the bankruptcy court. Congress, however, never intended the bankruptcy court to have "paramount" or exclusive jurisdic-

* Foley's suggestion that certain withdrawals from the debtor's capital in 1969 constituted fraudulent conveyances (Petitioners' Brief at 7) has also never been proven or supported by Foley, despite repeated requests inviting Foley to do so. Accordingly, it is submitted that Foley is thus obscuring the real issue before this Court.

tion over every insolvent debtor, as this Court has recently noted:

> "[B]ankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors * * *. [A] debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors * * *. Resort to the Court, therefore, is not [the debtor's] sole path to relief." *United States* v. *Kras*, —— U.S. ——, 92 S.Ct. 631, 638 (1973).

Indeed, in a concurring opinion, Chief Justice Burger stated that "the bankruptcy court is but one mode of orderly adjustment with creditors; it is not the only one since many debtors work out binding private adjustments with creditors." 92 S.Ct. at 640.

Secondly, Foley ignores the filing of a petition for an arrangement under Chapter XI of the Act by Blair on April 15, 1971. As a result thereof, Blair now is subject to the "exclusive jurisdiction" of the bankruptcy court. Section 311 of the Act, 11 U.S.C. §711. Indeed, the pending Blair arrangement proceedings render academic the issue presented to this Court, as previously discussed herein.

Foley has submitted no rational or legal basis to support a judicial enlargement or modification of the fifth act of bankruptcy. The decision of the Court of Appeals is consistent with established rules of statutory construction. Indeed, the dissenting opinion in the court below noted that the "approach of the majority cannot be said to be an unreasonable one" (Pet. App. "A" at 24). There has been no showing of any error in the decision of the Court of Appeals and Foley has advanced no supportable reason which would warrant any disturbance of that decision.

Conclusion

The judgment of the Court of Appeals should be affirmed in all respects.

Respectfully submitted,

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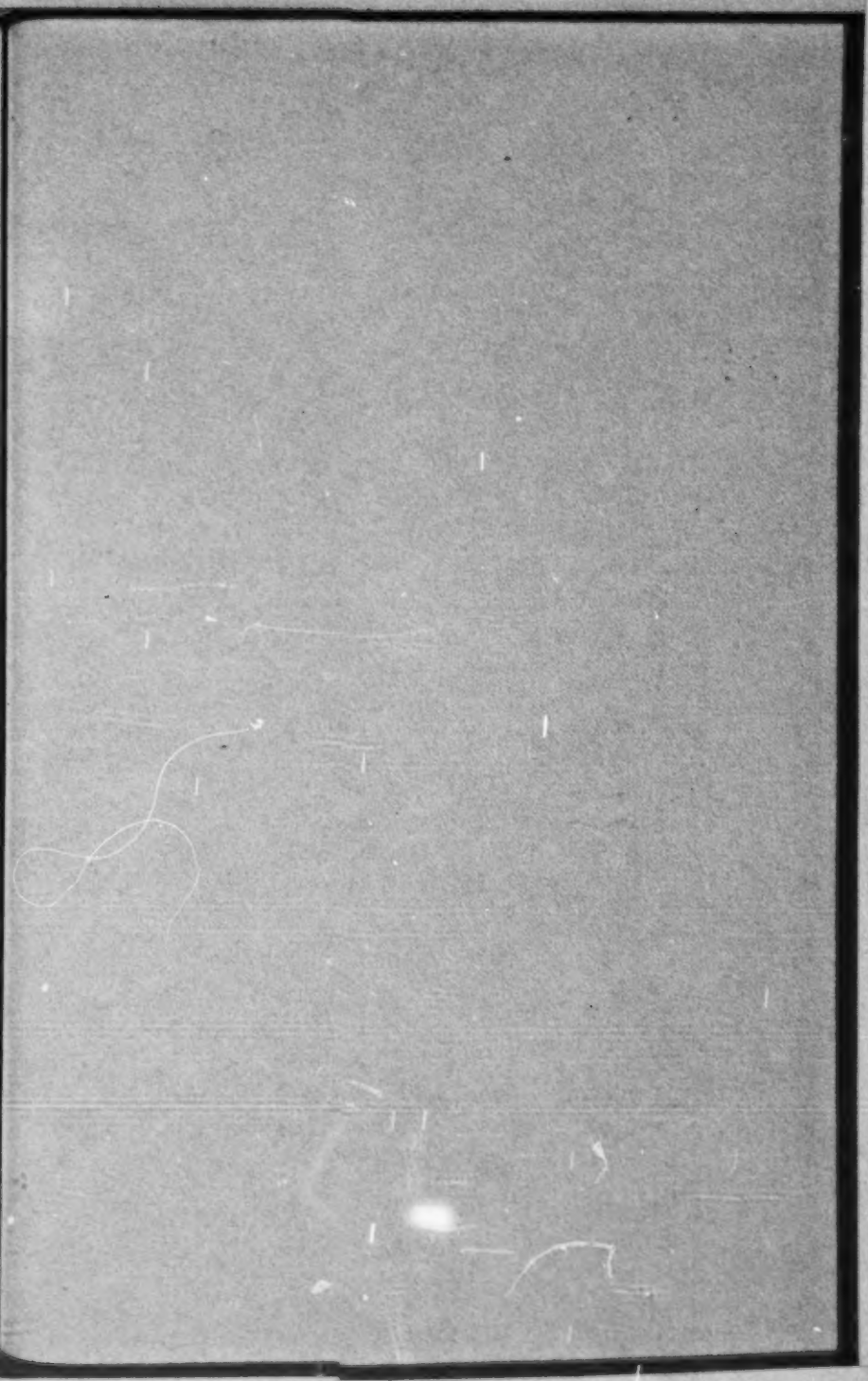
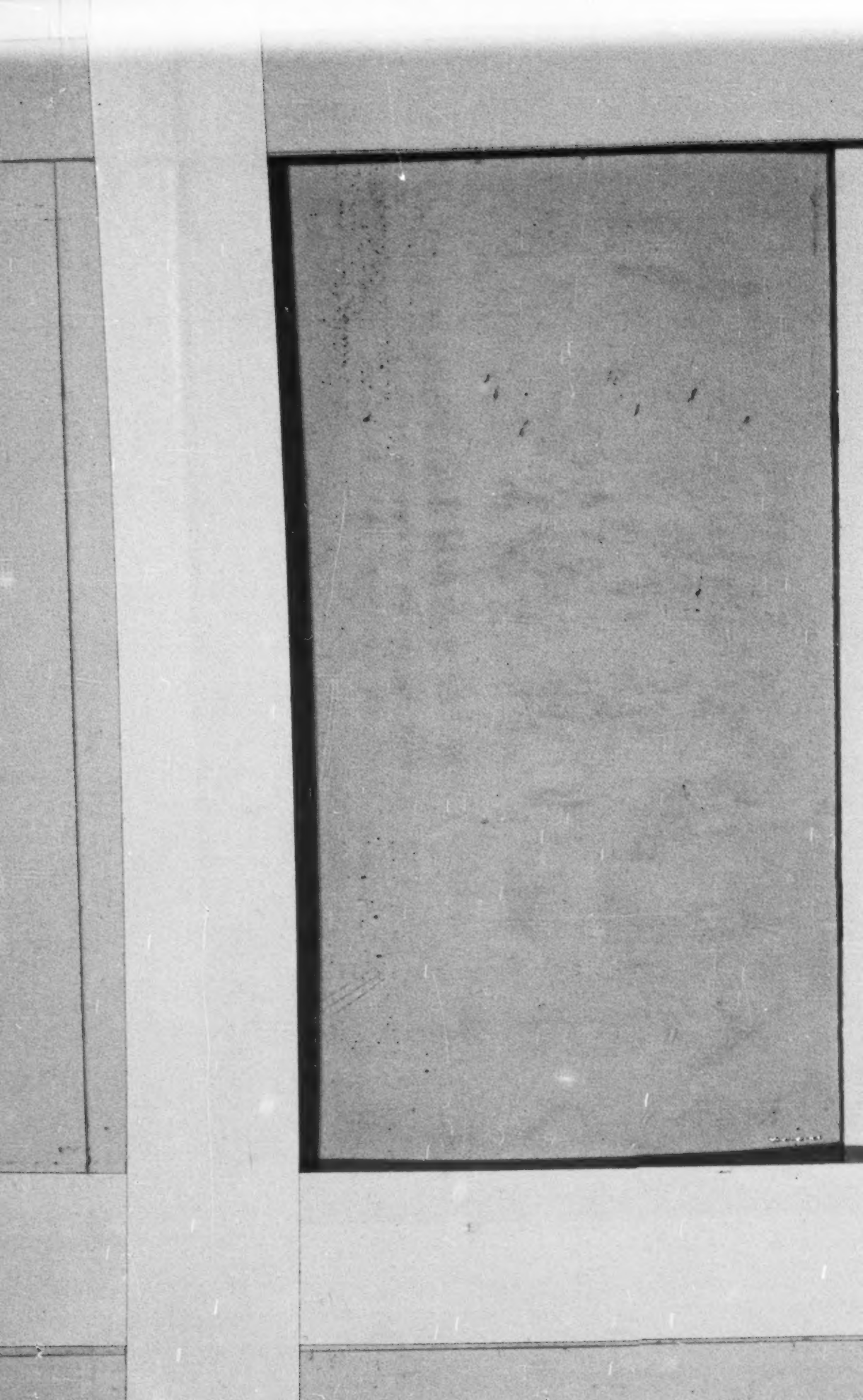
July 27, 1973





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Supreme Court of the United States

October Term, 1972

No. 72-1154

In the Matter

of

BLAIR & CO., INC.,

Debtor.

JOHN P. FOLEY, JR., J. P. FOLEY & CO., INC. and ANITA SALISBURY,

Petitioners,

against

BLAIR & CO., INC. and PATRICK E. SCORESE, as Liquidator appointed by the New York Stock Exchange, Inc. for BLAIR & CO., INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MEMORANDUM OF RESPONDENTS SUGGESTING THAT THE CAUSE IS MOOT

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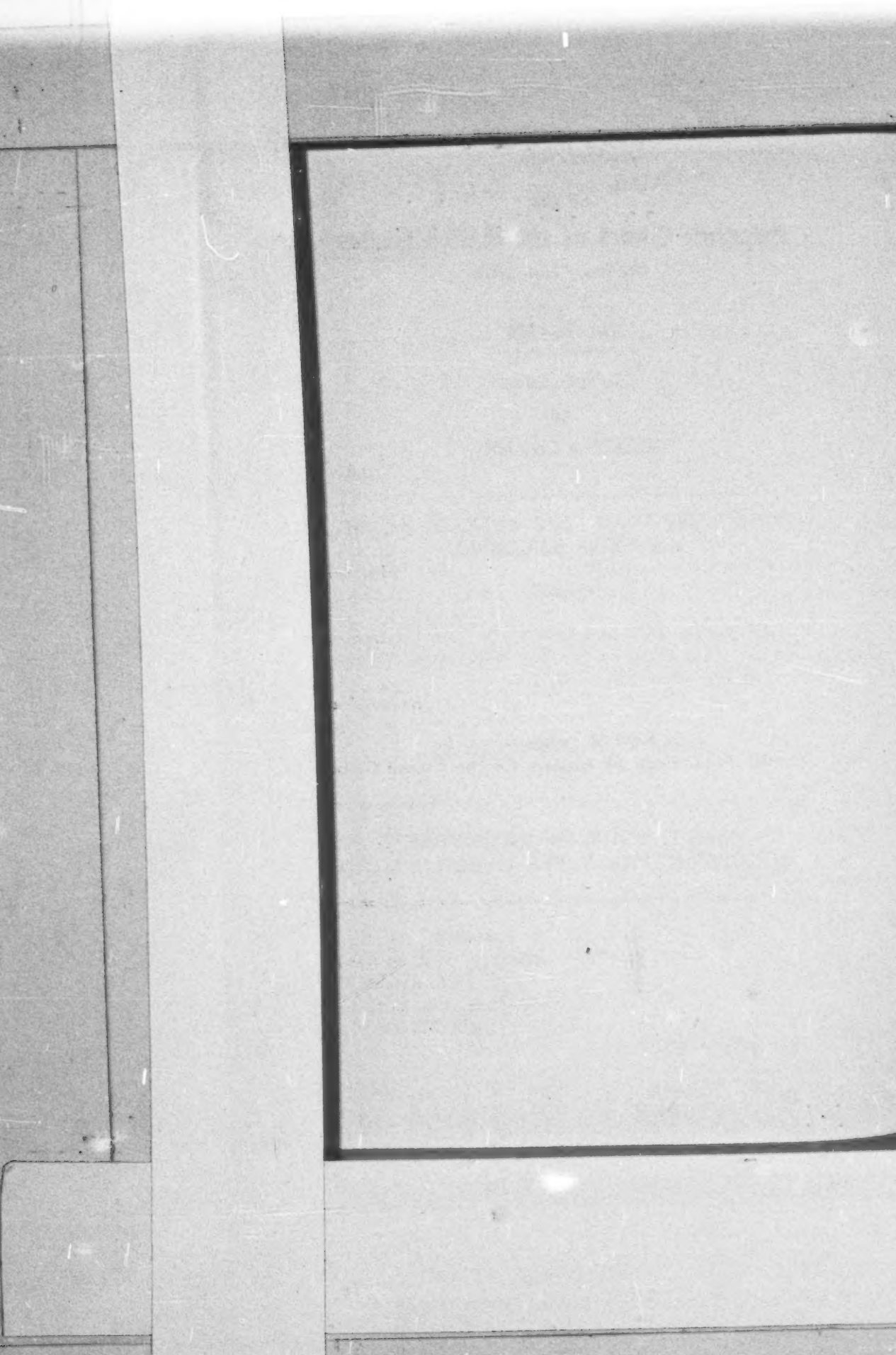

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Respondents.

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MEMORANDUM OF RESPONDENTS SUGGESTING THAT THE CAUSE IS MOOT

Respondents herein submit this memorandum to apprise the Court of certain facts which render this cause moot.

The question presented by Petitioners is as follows:

> Is the consensual appointment of a liquidating agent, who is not vested with title to the debtor's property and whose appointment does not affect the rights of creditors, the commission of an act of bankruptcy under Section 3a(5) of the Bankruptcy Act, 11 U.S.C. §21a(5)?

The determination of the foregoing question is wholly academic in the present circumstances of Blair & Co., Inc. ("Blair"). As stated at pages 12-16 of Respondents' Brief, the involuntary bankruptcy proceedings instituted against Blair by the Petitioners were superseded by the debtor's commencement of proceedings for an arrangement under Chapter XI of the Bankruptcy Act (the "Act"), 11 U.S.C. §701, *et seq.*, on April 15, 1971. Thereafter, such proceedings were prosecuted in accordance with the provisions of the Act. After acceptance of the Chapter XI arrangement by the requisite majority of unsecured creditors, the bankruptcy court entered an order on October 2, 1973 confirming the arrangement proposed by the debtor. The order of confirmation provides, *inter alia*:

> "The debtor [Blair] herein, by confirmation of the arrangement, be, and it hereby is, discharged from all of its unsecured debts and liabilities provided for by the arrangement or in this order, but excluding such debts as under Section 17 of the Bankruptcy Act are not discharged."

Thus, Blair was discharged from its unsecured debts and liabilities as a result of the confirmation of its arrangement. See Section 371 of the Act, 11 U.S.C. §771; *In re Kornbluth*, 65 F.2d 400, 402 (2d Cir. 1933).

No appeal was taken from the order of confirmation. It is therefore final and binding upon all creditors of Blair. Section 367(1) of the Act, 11 U.S.C. §767. By virtue thereof, all bankruptcy proceedings involving Blair have been terminated and a determination of the question presented by Petitioners will be of no consequence or effect. Whether Blair did or did not commit the act of bankruptcy asserted by the Petitioners is thus moot.

The conclusive effect of an arrangement under Chapter XI of the Act

> "* * * may be compared in result to a decree of adjudication in bankruptcy. An adjudication in bankruptcy is a judgment *in rem*, a determination of the debtor's status as a bankrupt, binding upon all parties in interest. * * * Similarly, an order confirming an arrangement is a judgment *in rem*, a determination of the rights and liabilities created by the arrangement, binding upon all parties in interest, whether or not they appeared."

9 Collier, Bankruptcy, ¶9.25 at 336-337 (14th Ed. 1972).

Section 70i of the Act, 11 U.S.C. §110i, provides in pertinent part that "[u]pon the confirmation of an arrangement * * *, the title to the property dealt with shall revest in the * * * debtor, or vest in such other person as may be provided by the arrangement. * * *" Thus, in the case of Blair, on October 2, 1973, the property of the debtor passed from the custody of the court in accordance with the provisions of the confirmed arrangement and is now no longer subject to the jurisdiction of the bankruptcy court. In *In re Rubins*,* the essence of the applicable principles was stated as follows:

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*74 F.2d 432, 434 (7th Cir. 1934), *cert. denied*, 295 U.S. 758 (1935) (decided under former Section 12 of the Act).

> "The composition, *upon confirmation, supersedes bankruptcy proceedings,* revests title in the bankrupt, and has the *effect of full administration in bankruptcy.*" [Emphasis supplied.]

Accord, 9 Collier, *supra,* ¶9.33 at 409.

Accordingly, by reason of the consummated Chapter XI proceedings, Blair has undergone a full administration in bankruptcy as contemplated by the Act. The question presented is, therefore, only of academic interest. There is no real or pending controversy presented which will determine rights of litigants in this proceeding.

It is respectfully submitted that the Petitioners are requesting the court to rule upon an abstract question which can have no impact upon the instant matter. In *International Shoe Co.* v. *Smith-Cole, Inc.,** the Court of Appeals stated the applicable principle in the following manner:

> "Courts are organized to adjudicate controversies of substance, and not to declare abstract rules of law. • • • Courts have enough to do in passing on substantial controversies without wasting their time in superintending the transfer of money from one pocket of another. • • • The long and short of the matter is that this proceeding is aimed at a dissipation, and not the conservation, of the [debtor's] estate. • • • The process of the courts cannot be used to enforce contracts infected with champerty or maintenance; nor can they be used for that purpose in this more direct manner.
>
> The avowed purpose of the suit being to assert an abstract right at the expense of the creditors, and that

*62 F.2d 972, 974 (10th Cir. 1933).

being its inevitable result, the action was properly dismissed."

This Court has declined to exercise jurisdiction over controversies seeking to resolve wholly academic questions. *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969); *Hall* v. *Beals*, 396 U.S. 45 (1969).

Respondents respectfully suggest that in view of the applicable facts, the question presented by Petitioners is moot and the appeal should be dismissed on the ground that the petition for certiorari was improvidently granted.

Respectfully submitted,

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Of Counsel.

October 26, 1973

FOLEY ET AL. *v.* BLAIR & CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 72-1154. Argued November 12, 1973—
Decided December 5, 1973

Respondent securities broker was adjudged an involuntary bankrupt for having committed the fifth act of bankruptcy under § 3a (5) of the Bankruptcy Act. This adjudication was reversed by the Court of Appeals, but subsequently the bankruptcy court, on a petition by the broker which had been filed shortly after the adjudication, confirmed the broker's proposed arrangement with creditors under Chapter XI of the Act. *Held:* Where the issue of whether the confirmation of the Chapter XI arrangement renders the case moot because the petitioners no longer have a monetary stake in resolving whether the fifth act of bankruptcy had been committed, was briefed and argued before this Court, but because of the sequence of events was necessarily not treated in the Court of Appeals' opinion, the Court of Appeals should have the opportunity to consider such issue in the first instance, and in doing so, it should consider the effect of § 64a (1) of the Act providing that "one reasonable attorney's fee" for services rendered to petitioning creditors in involuntary bankruptcy cases shall be treated as a priority debt.

471 F. 2d 178, vacated and remanded.

Leo H. Raines argued the cause and filed a brief for petitioners.

Harvey R. Miller argued the cause for respondents. With him on the brief were *Charles Seligson, Michael L. Cook,* and *Donald J. Zoeller.*

PER CURIAM.

Blair & Co., Inc., was a member of the New York Stock Exchange, engaged in the general brokerage and commission business. In the early summer of 1970, as the result of operating losses and a shrinkage of capital,

Blair began a program of self-liquidation, which involved the transfer of customer accounts to other broker-dealers and the delivery of securities to customers so requesting. Blair apparently believed that its resources were sufficient to allow it to discharge its obligations to all customers and general creditors through this program. In September 1970, however, Blair concluded that successful implementation of this program might require the assistance of a Special Trust Fund which the New York Stock Exchange had established in 1964 to avoid bankruptcy of member firms.[1]

Consequently, on September 21, 1970, Blair entered into an agreement with the New York Stock Exchange, whereby the trustees of the special fund would make loans and guarantees to protect Blair's customers against loss. The agreement provided that the first such loan, guarantee, or advance by the fund would give the New York Stock Exchange the power to appoint a Liquidator of its own choosing to manage Blair's affairs. The powers of the Liquidator were set forth in the agreement.[2]

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[1] The Special Trust Fund is authorized by the Constitution of the New York Stock Exchange, Art. XIX, § 1.

[2] Paragraph VIII of the agreement provided:

"Immediately following his appointment by the Exchange, the Liquidator shall take control of the business and property of the Corporation for the purpose of liquidating the business of the Corporation and shall proceed as follows in connection with the liquidation:

"i.) he shall promptly take such steps as he may deem practicable to reduce the Corporation's operating expenses and to dispose of the Corporation's salable assets;

"ii.) he shall have power to retain independent public accountants, consultants, counsel and other agents and assistants and shall have power to augment and reduce or eliminate the staff of the Corporation;

"iii.) he shall, as soon as practicable, assert and collect or settle all claims and rights of the Corporation;

On September 25, 1970, the trustees made an initial advance of $1,000, which triggered the appointment of respondent Patrick E. Scorese as Liquidator. Any plans for further advances or loans were terminated four days later, however, when the petitioners, holders of subordinated debentures of Blair, filed an involuntary petition in bankruptcy against Blair in the United States District Court for the Southern District of New York. *Inter alia*, the petition alleged that the appointment of the Liquidator constituted an act of bankruptcy under § 3a (5) of the Bankruptcy Act, 11 U. S. C. § 21 (a)(5). That section makes it an act of bankruptcy if any person

> "(5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."

Concluding that Blair's consent to the appointment of the Liquidator in fact constituted this fifth act of bankruptcy, the Referee adjudicated Blair an involuntary bankrupt. The District Court denied a petition to review his order. On appeal, however, a divided panel of the Court of Appeals for the Second Circuit reversed, reasoning that the Liquidator was not a "receiver or

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"iv.) he shall pay any claim against the Corporation considered by him to be a valid claim of any customer of the Corporation;

"v.) he shall take such other steps as he deems necessary or appropriate to liquidate the business of the Corporation.

"It is agreed that consistent with the duty of the Liquidator to effect a fair and orderly liquidation of the business of the Corporation to enable prompt settlement with its customers, the Liquidator shall act in accordance with what he deems to be good business practice."

On the same date that this agreement was signed, Blair executed a second instrument that more specifically delineated the powers of the Liquidator, who was described as "the true and lawful attorney and agent of and for the Corporation [Blair]."

trustee" within the statutory definition. 471 F. 2d 178. We granted the writ of certiorari, 411 U. S. 930, in order to resolve this issue of seeming importance in the administration of the Bankruptcy Act, and oral argument was heard on November 12, 1973.

The respondents have suggested, however, that we should not decide the merits of the controversy, because the present circumstances of Blair & Co. render the case moot. The suggestion is premised on a series of events following the filing of the original involuntary petition. On April 15, 1971, two days after the Referee had granted the petitioners' motion for summary judgment on the issue of whether Blair had committed the fifth act of bankruptcy, Blair filed a petition for relief under Chapter XI of the Bankruptcy Act, pursuant to § 321 of the Act, 11 U. S. C. § 721.[3] On May 18, 1971, the Referee entered an order pursuant to § 325 of the Act, 11 U. S. C. § 725, staying ordinary bankruptcy proceedings under Chapters I-VII pending the determination of the Chapter XI petition.

On May 26, 1971, Blair filed with the District Court its proposed arrangement with its creditors under Chapter XI. On September 27, 1971, the bankruptcy court found that the proposed arrangement had been accepted in writing by the requisite majority in number and amount of Blair's creditors, in accordance with §§ 336 (4) and 362 of the Act, 11 U. S. C. §§ 736 (4), 762.[4] Shortly thereafter on October 4, 1971, the petitioners moved in the District Court to dismiss the Chapter XI proceedings. This motion was not acted upon until February 16, 1973, after the Court of Appeals had reversed the adjudication of Blair as an involuntary bankrupt; on that date,

[3] The actual order adjudging Blair a bankrupt was not issued until April 27, 1971.

[4] The September 27 finding was an oral one, made in open court. Written findings to the same effect were filed on December 27, 1971.

the motion was denied. On June 12, 1973, the District Court denied a petition for review of that order. On October 2, 1973, while the present case was awaiting argument in this Court, the bankruptcy court entered an order confirming the arrangement proposed by Blair under Chapter XI. Apparently, no appeal was taken from the order of confirmation.

In light of the confirmation of the Chapter XI arrangement, the respondents suggest that this case no longer presents a live controversy. They rely upon § 371 of the Act, 11 U. S. C. § 771, which provides that confirmation of an arrangement "shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement," and argue that the petitioners thus no longer have any monetary stake in resolution of the controversy over whether the fifth act of bankruptcy was committed. See generally 9 W. Collier, Bankruptcy ¶¶ 9.32, 9.33 (14th ed. 1972). The respondents also argue that the original adjudication of bankruptcy is irrelevant to the present situation, since § 322 of the Act, 11 U. S. C. § 722, does not make the pendency of bankruptcy proceedings a prerequisite to the filing of a petition for relief under Chapter XI.

While the issue of mootness was briefed and argued before this Court, it was not treated in the opinion of the Court of Appeals, no doubt because the final confirmation order was not entered by the District Court until well after the appellate court had issued its judgment. Under these circumstances, we think it appropriate that the Court of Appeals have the opportunity to consider the mootness issue in the first instance. In reviewing the question of mootness, the Court of Appeals should consider the effect of § 64a (1) of the Act, 11 U. S. C. § 104 (a)(1). *Inter alia*, that section provides that "one reasonable attorney's fee" for the services rendered to

etitioning creditors in involuntary cases shall be treated
s a priority debt in bankruptcy proceedings, payable
ut of the estate in advance of distribution of any
ividends to creditors. Section 64 is made applicable
o § 321 Chapter XI proceedings by § 302 of the Act, 11
J. S. C. § 702, and thus might allow the treatment of
t least some of the petitioners' counsel fees as a priority
xpense. See 8 W. Collier, Bankruptcy ¶ 5.33 [3.1] and
. 25 (14th ed. 1972); see also *Reading Co.* v. *Brown*,
91 U. S. 471, 475.[5]

For the reasons stated above, we vacate the judgment
f the Court of Appeals, and remand the case to that
ourt to consider whether it has now become moot.

It is so ordered.

[5] While the effect of § 64a (1) upon the issue of mootness was
scussed at oral argument, it was not the subject of briefing by
ther of the parties.